

UNIVERSITY OF CAPE TOWN

FACULTY OF LAW



**LABOUR REGULATION IN THE ON-DEMAND ECONOMY:
AN 'UBERIFICATION' OF THE STATUS QUO?**

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I, Caitlin Bruce, declare that this dissertation titled, 'Labour Regulation in the On-Demand Economy: An 'Uberfication' of the Status Quo?' is my own work, that all the sources used or quoted have been indicated and acknowledged by means of complete references, and that this dissertation was not previously submitted by me for a degree at any other university.

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ABSTRACT

Uber has reached rock-star status in the world of 'gigs', 'rabbits' and 'rides' known as the 'on-demand economy'. Uber is but one in a sea of online platforms that seek to link clients with workers offering traditional services like transport, cleaning, repairs or running errands. These platforms act as a mediator between clients and workers and often set minimum quality standards, manage the payment process as well as the supply of work. However, as these platforms gain prevalence in today's labour market, the question of worker protection comes rushing to the fore. On the one hand, these platforms are praised for having reduced the barriers to income for individuals who might not readily be able to enter the traditional labour market. On the other hand, critics of the on-demand economy argue that companies, like Uber, shift risks to their employees by misclassifying them as independent contractors, thereby weakening labour protections and driving down wages and in favour of their own profit margins.

The question of whether Uber drivers are employees or independent contractors has sparked debate in the US. This study seeks to engage in this debate albeit in the South African context. In the absence of a definitive pronouncement from a South African decision maker as to the status of Uber drivers, the core research question posed by this study is whether Uber drivers are employees under South African law. The objective of the study is to determine whether existing labour laws in South Africa offer adequate protection to workers, like Uber drivers, in the on-demand economy. It will be argued that Uber drivers do not neatly fall within the definition of employee in section 213 of the LRA. However, Uber drivers do not neatly fit the category of independent contractor either. The fact that the aspects of the 'uberfied' work relationship do not seem to speak to the factors enumerated in the South African tests of employment suggests that perhaps these factors are outdated in the context of the on-demand economy.

But, this is not a new problem. It will be argued that the problems faced by 'gig' workers in the on-demand economy should be viewed as an extension of a broader trend towards the casualisation of labour. In this sense, it can be said that

the type of work relationship created by companies like Uber, is simply an 'uberfication' of the status quo. In other words, companies like Uber have done no more than give the non-standard employee a smart phone application with which to earn an income.

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CHAPTER 1: INTRODUCTION TO GIGS, RABBITS AND RIDES

Jan Theron, writing in 2003 about the process of externalisation and the global shift to services said that ‘employment is not what it used to be’.¹ That statement is even more accurate today with advent of the ‘on-demand economy’. The on-demand economy² goes by many names; it has been referred to as the ‘gig economy’,³ the ‘sharing economy’⁴ and the ‘peer economy’⁵ amongst others. These names are used broadly to refer to any socially networked system that relies on coordinating networks of people.⁶ The on-demand economy has come to be known for its innovative use of websites and mobile applications which link workers to clients seeking services, at the click of a mouse or the tap of a phone screen.⁷ Work in the on-demand economy is characterised as ‘flexible, autonomous and short term in nature.’⁸ The tasks performed by workers are often referred to as ‘gigs’ which speaks to the perceived impermanence of work relationships in the on-demand economy.⁹

There are broadly two kinds of work that takes place in this economy, ‘crowd work’ and ‘work on-demand via apps’.¹⁰ The first category of work entails the

¹ Jan Theron ‘Employment Is Not What It Used To Be’ (2003) 24 ILJ 1247 at 1247.

² Elizabeth J Kennedy, ‘Employed by an Algorithm: Labor Rights in the On-Demand Economy’ (2017) 40 *Seattle U.L. Rev.* 987 at 1000.

³ Valerio de Stefano ‘The Rise of the “Just-In-Time-Workforce”: On-demand work, crowd work and labour protection in the gig economy’ (Geneva ILO, 2016) *Conditions of Work and Employment Series No. 71*

⁴ Denise Cheng ‘Is Sharing Really Caring? A Nuanced Introduction To The Peer Economy’ (October 2014), *Open City Foundations*, available at <https://static.opensocietyfoundations.org/misc/future-of-work/the-sharing-economy.pdf>, accessed on 12 June 2018.

⁵ *Ibid.*

⁶ Cheng op cit. n4 at 2.

⁷ Emily C. Atmore ‘Killing the Goose that Laid the Golden Egg: Outdated Employment Laws are Destroying the Gig Economy’ (2017) 102 *Minn. L. Rev.* 887 at 888.

⁸ *Ibid.*

⁹ *Ibid.*; See also, Geoff Nunberg ‘Goodbye Jobs Goodbye Jobs, Hello ‘Gigs’: How One Word Sums Up A New Economic Reality’, *NPR* 11 January 2016, available at <https://www.npr.org/2016/01/11/460698077/goodbye-jobs-hello-gigs-nunbergs-word-of-the-year-sums-up-a-new-economic-reality>, accessed on 22 December 2018.

¹⁰ De Stefano op cit. n3 at 1.

completion of a series of tasks via online platforms.¹¹ Amazon Mechanical Turk (“**MTurk**”) is one of the more famous examples of a crowd work platform. Workers are linked to clients to perform discreet tasks virtually.¹² These tasks can range from ‘simple data validation and research to more subjective tasks like survey participation, content moderation’.¹³ Workers engaged in crowd work have been referred to as the ‘invisible workers’ because the nature of their work means that they may never ‘meet’ the client to whom they render services.¹⁴

The second category of work involves the execution of traditional services like transport, cleaning, repairs or running errands by workers who sign up to online or mobile platforms like TaskRabbit, GigWalk, FieldAgent, Uber and Lyft to name a few (this is truly the tip of the iceberg¹⁵) which link the worker to clients seeking these services.¹⁶ The platform typically sets minimum quality standards, manages the payment process and the selection and management of the workforce.¹⁷

However, as these platforms gain prevalence in today’s labour market, the question of worker protection comes rushing to the fore. On the one hand, these platforms are praised for having ‘significantly reduced the barriers to reliable, independent income’¹⁸ thereby facilitating economic growth and the ‘empowerment of ordinary people’.¹⁹ On the other hand critics argue that, far from engendering a culture of sharing, companies like Uber shift their operational risks to workers by

¹¹ *Ibid.*

¹² Unknown Author ‘Overview’ *Amazon Mechanical Turk Website* available at <https://www.mturk.com/>, accessed on 22 December 2018.

¹³ *Ibid.*

¹⁴ de Stefano op cit. n3 at 21.

¹⁵ See, Sajad ‘Top 100 Gig Economy Jobs Like Uber’ *Hurdlr*, 23 February 2018 available at <https://www.hurdlr.com/blog/on-demand-economy-gigs>, accessed on 22 December 2018.

¹⁶ De Stefano op cit. n3 at 1.

¹⁷ *Ibid.*

¹⁸ Cheng op cit. n4 at 17.

¹⁹ Juliet Schor ‘Debating the Sharing Economy’ *Great Transition Initiative* (Oct, 2014) available at <https://www.greattransition.org/publication/debating-the-sharing-economy>, accessed on 22 December 2018.

*mis*classifying them as independent contractors, thereby weakening labour protections and driving down wages and in favour of their own profit margins.²⁰

The focus of this study is Uber because of the prevalence that it has gained as a platform that offers ‘work on-demand via apps’, the second category referred to above. Uber has reached rock-star status in the world of ‘gigs’, ‘rabbits’ and ‘rides’ since it was first launched in San Francisco in 2010.²¹ Uber owns and operates a smartphone application which ‘mediates demand between two user groups’ namely, Uber drivers and riders seeking transportation services (“**the Uber App**”).²² The company has broadened its reach to over 250 cities and in 2015, a mere five years since its launch, its valuation was said to be at \$70 billion.²³ In 2017, a spokesperson reported that Uber had roughly 2 million drivers globally and approximately 750 000 in the United States.²⁴ If these statistics are indeed correct then it is clear that the growth of this kind of work, being work performed via mobile or online applications, is significant.

However, Uber’s rise to stardom has not been without its proverbial bumps in the road. Uber has faced considerable backlash from regulators in certain countries with its operations being suspended in Bulgaria, Finland, France and the Netherlands for failing to comply with existing taxi regulations.²⁵ Vancouver, British Columbia is amongst one of the countries that has banned ride-hailing apps

²⁰ Avi Shaprio ‘Against Sharing’, *Jacobin*, September 2019, available at <https://www.jacobinmag.com/2014/09/against-sharing/>, accessed on 22 December 2018.

²¹ Richard Koch ‘How Uber Used a Simplified Business Model to Disrupt the Taxi Industry’, *Entrepreneur*, 3 January 2017, available at <https://www.entrepreneur.com/article/286683>, accessed on 22 December 2018.

²² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (“NUPSAW”) and others* [2018] 4 BLLR 399 (LC) at 3.

²³ *Ibid.*

²⁴ Sara Ashley O’Brien ‘Uber has more work to do winning over drivers’, *CNN Business*, 18 December 2017 available at <https://money.cnn.com/2017/12/18/technology/uber-drivers-180-days-of-change/index.html>, accessed on 22 December 2018.

²⁵ Anna Rhodes ‘Uber: Which Countries have Banned the Controversial Taxi App’, *Independent*, 22 September 2017, available at <https://www.independent.co.uk/travel/news-and-advice/uber-ban-countries-where-world-taxi-app-europe-taxi-us-states-china-asia-legal-a7707436.html>, accessed on 2 January 2019.

altogether in favour of its local taxi services, although this ban may not be permanent.²⁶

In those cities where Uber does operate, it has been the subject of legal action from its drivers who allege that Uber has misclassified them as independent contractors and is accordingly in contravention of the applicable labour laws. The most notable of these cases are two US class action suits, *O'Connor v Uber Technologies Inc.*²⁷ ("**O'Connor v Uber**") and *Razak v Uber Technologies, Inc.*²⁸ ("**Razak v Uber**"). In both cases, decided in different jurisdictions, the court was required to determine whether the drivers were independent contractors as a matter of law in order to justify an order granting Uber its motion for summary judgment. A further case that has been widely reported involves Uber's competitor in the US, Lyft which operates along much the same lines as Uber. In *Cotter v Lyft Inc.* ("**Cotter v Lyft**")²⁹ the court was also required to determine whether the Lyft drivers were independent contractors as a matter of law for purposes of determining whether Lyft was entitled to summary judgment.

These cases are discussed in further detail in Chapter Four below. The crucial point to be made at this juncture is that the contrasting judgments of Judge Chen in *O'Connor v Uber*³⁰ and Judge Baylson in *Razak v Uber*³¹ suggest that the task of classifying on-demand workers in terms of existing US labour laws is no easy task. As judge Chhabria notes in *Cotter v Lyft*³², a decision maker 'will be handed a square peg and asked to choose between two round holes'.³³ In the US there is some consensus amongst academics that one of the major challenges for

²⁶ Josh Martinez 'Which Cities Have Banned Ride-Sharing Apps?', *Passport Health*, 13 June 2018, available at <https://www.passporthealthusa.com/2018/06/which-cities-have-banned-ride-sharing-apps/>, accessed on 2 January 2019.

²⁷ *O'Connor v Uber Technologies, Inc.* 82 F Supp. 3d 1133, 1135 (2015).

²⁸ *Razak v Uber Technologies, Inc.*, CV 16-573, 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018) available at <https://www.isdc.ch/media/1591/14-razak-v-uber.pdf>.

²⁹ *Cotter v Lyft Inc.* 60 F. Supp 3d 1067 (2015).

³⁰ *O'Connor v Uber* supra n27.

³¹ *Razak v Uber* supra n28.

³² *Cotter v Lyft* supra n29.

³³ *Cotter v Lyft* supra n29 at 19.

US labour law is the fact that many of the common law tests seem to be outdated in the context of the on-demand economy.³⁴

Uber launched in South Africa during 2013 and since then the country has seen several bouts of protest action from Uber drivers, protesting against unfair working conditions,³⁵ and traditional taxi drivers, protesting against unfair competition from Uber drivers.³⁶ During July 2018 Uber drivers protested outside Uber's Johannesburg Offices.³⁷ The drivers claimed that they often struggled to make ends meet working for Uber as the company unilaterally dropped prices which made covering expenses a difficult if not impossible task for the drivers.³⁸

However, there has yet to be a definitive pronouncement on the employment status of Uber drivers in South Africa. The case of *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers ("NUPSAW") and others*.³⁹ ("**Uber SA v NUPSAW**") concerns an application brought by Uber Technologies (Pty) Ltd ("**Uber SA**") to review and set aside a Commission for Conciliation, Mediation and Arbitration ("**CCMA**") *in limine* jurisdictional ruling. The CCMA Commissioner ("**the Commissioner**") held that the Uber drivers were employees of Uber SA as contemplated in section 213 of the Labour Relations Act⁴⁰ ("**LRA**") and accordingly the CCMA had jurisdiction to hear the unfair dismissal claims brought by the Uber drivers.⁴¹

³⁴ John A. Pearce II & Jonathan P. Silva, 'The Future of Independent Contractors and Their Status as Non-Employees: Moving from a Common Law Standard' (2018) 14 *Hastings Bus. L. J.* 1; See also, Atmore op cit. n7.

³⁵ Ernest Mabuza 'This is why I'm striking – Uber driver explain how petrol hikes have nearly crippled him', *Times Live*, 4 July 2018, available at <https://www.timeslive.co.za/news/south-africa/2018-07-04-this-is-why-im-striking-uber-driver-explains-how-petrol-hikes-have-nearly-crippled-him/>, accessed on 15 January 2019.

³⁶ Lizeka Tandwa ' "Uber is Killing Us" – Protesting Metered Taxi Driver", *News24*, 10 March 2017, available at <https://www.news24.com/SouthAfrica/News/uber-is-killing-us-protesting-metered-taxi-driver-20170310>, accessed on 15 January 2019.

³⁷ Mabuza op cit. n 35.

³⁸ *Ibid.*

³⁹ *Uber SA v NUPSAW* supra n22.

⁴⁰ Labour Relations Act, No. 66 of 1995.

⁴¹ *Uber SA v NUPSAW* supra n22 at 24.

However, the Commissioner conflated the distinction between Uber BV, the company that owns and operates the Uber App, and Uber SA, a company that provides support and maintenance services to Uber BV.⁴² Accordingly, the question of whether the Uber drivers were employees of Uber BV, who was not a party to the proceedings in the CCMA or the Labour Court, remains to be determined.⁴³ In the Labour Court decision, Judge Andre van Niekerk notes that each of the building blocks of the drivers' case pertains to Uber BV and not Uber SA'.⁴⁴

This study seeks to engage in the debate as to the status of Uber drivers and whether they are adequately protected by labour laws, albeit in a South African context. The objective of this study is to determine whether existing labour laws in South Africa offer adequate protections to workers in the on-demand economy. As employee status is seen to be the golden ticket to these protections, the core research question is thus whether Uber drivers, being Uber 'partner-drivers' as defined in Chapter Two below, are employees in terms of South African labour law.

It will be argued that the factors enumerated in the South African common law tests of employment do not easily fit the circumstances of the 'gig' workers working arrangements. As a follow on from this contention, the study will interrogate whether the 'gig' worker is really something new to the labour market. In other words, are 'gig' workers and the challenges faced by them something completely different to the workers that have been 'located in a grey area between employment and self-employment'⁴⁵ since the end of the twentieth century or is the 'gig' worker ultimately the same thing (albeit in trendier clothing). It will be argued in Chapter Seven of this dissertation, that the 'uberfied' work relationship can be seen as a modern manifestation of the process of externalisation; an 'uberification' of the status quo if you will.

Relative to the US, there is very little South African judicial or academic comment on this subject. In the circumstances, the research question is addressed

⁴² *Uber SA v NUPSAW* supra n22 at 31.

⁴³ *Uber SA v NUPSAW* supra n22 at 38.

⁴⁴ *Uber SA v NUPSAW* supra n22 at 37.

⁴⁵ Paul Benjamin 'An Accident of History: Who is (And Who Should Be) an Employee under South African Labour Law' (2004) 25 ILJ 787 at 789.

through a comparative analysis of the relevant US and South African case law and legislation. Moreover, the study will also draw on certain secondary sources such as books, journal articles and ILO working papers to bolster the analysis. It is noted that the dissertation relies on numerous web articles. Given that the on-demand economy and companies like Uber are fairly new to the labour market these articles are useful in that they provide access to the most recent developments in case law, protest action, Uber's business model, amongst others and public opinion in respect thereof.

Chapter Two of this study is an introduction to Uber's business model and the categories of drivers that are registered on the Uber App. It will be noted that this study is only concerned with one category of Uber drivers namely, 'partner-drivers' who own their own vehicles and who register on the Uber App and carry out rides in their personal capacity. To avoid confusion, any reference to 'driver' or 'Uber driver' in this dissertation must be construed as a reference to the Uber 'partner-driver' category unless expressly stated otherwise. The Chapter will also provide some insight into the 'on-boarding' process that drivers must undergo in order to be activated on the Uber App as well as Uber's interactions with the drivers post activation.

Chapter Three examines the US labour law system and entails an overview of the key pieces of US labour legislation as well as the common law tests of employment. The purpose of this Chapter is to provide a framework within which to discuss the cases in which the US courts have been asked to determine whether Uber drivers, and Lyft drivers, are employees or independent contractors. It will be argued in this Chapter that one of the major challenges facing US labour law is the fact that many of the common law tests of employment are outmoded in the context of the on-demand economy. This means that workers in the on-demand economy, like Uber drivers, are not adequately protected by existing labour laws because the task of classifying them is difficult and does not lend itself to a certain outcome.

Chapter Four is an analysis of the cases in which the US courts have been asked to determine whether drivers in the on-demand economy are employees or independent contractors. The Chapter includes an analysis of two cases decided

under California law involving Uber drivers and Lyft drivers, *O'Connor v Uber*⁴⁶ and *Cotter v Lyft*⁴⁷ as well as the case of *Razak v Uber*⁴⁸ which was decided under Pennsylvania law.

Chapter Five includes an overview of the development of South African labour law, labour legislation and the common law test of employment. Chapter Six seeks to address the core research question posed by this study namely, whether Uber drivers are employees under South Africa law. In the absence of a definitive pronouncement from a South African decision-maker as to the status of Uber drivers, this Chapter will draw on the reasoning of the US courts as well as the findings of the CCMA Commissioner referred to in *SA v NUPSAW*.⁴⁹ Chapter Six will also examine the challenges of the current tests of employment in South Africa in the context of the on-demand economy.

Chapter Seven addresses the question of whether the 'gig' worker is something new to the existing labour market. It will be argued that it is not and as de Stefano asserts, the on-demand economy should not be seen as a 'parallel universe' to the existing labour market.⁵⁰ Accordingly, there is a kinship between the 'gig' worker and those non-standard employees who occupy the 'grey area between employment and self-employment'.⁵¹ Chapter Seven will also consider the concept of 'dependent self-employment' being an intermediate category between employee and independent contractor status.⁵² Chapter Eight concludes this minor dissertation.

⁴⁶ *O'Connor v Uber* supra n27.

⁴⁷ *Cotter v Lyft* supra n29.

⁴⁸ *Razak v Uber* supra n28.

⁴⁹ *Uber SA v NUPSAW* supra n22.

⁵⁰ De Stefano op cit. n3 at 6.

⁵¹ Benjamin op cit. n45 at 789.

⁵² De Stefano op cit. n3 at 8.

CHAPTER 2: UBER, ALL ABOARD!

I. UBER AND THE DISRUPTION OF THE TRADITIONAL TAXI SECTOR

Uber first launched the Uber App in San Francisco in 2010 following the economic downturn of 2008.⁵³ The Uber App is a smartphone application that 'mediates demand between two user groups' namely, Uber drivers and riders seeking transportation services.⁵⁴ Uber is said to have disrupted the traditional sector in that it has 'created a far more efficient market for car hire services.'⁵⁵ The Uber App has substantially reduced the transaction costs typically associated with the traditional taxi sector.⁵⁶ The most significant of these are the search costs borne by metred taxi companies.⁵⁷

A day in the life of a traditional metred taxi cab driver would typically entail driving around for several hours or congregating in high-demand areas, such as the airport, in the hopes of finding a willing customer. These wasted search costs would be borne by the metred taxi company, if that company had classified its drivers as employees, or the metred taxi driver, if he or she was an independent contractor, and in some instances would far outweigh the amount earned from rides completed. At this juncture it should be pointed out that Uber's classification of its drivers as independent contractors is not unique to its business model and in fact many metred taxi companies have employed this strategy for years.⁵⁸ In addition, the problem of poaching rides is common in the metred taxi industry.⁵⁹ A customer, frustrated with having to wait for a taxi driver to arrive after having been dispatched

⁵³ Koch op cit. n21.

⁵⁴ *Uber SA v NUPSAW* op cit. n22 at 3.

⁵⁵ Brishen Rogers, 'The Social Costs of Uber' (2015-2016) 82 U.Ch.L Rev. Dialogue 85 at 86.

⁵⁶ Rogers op cit. n55 at 87.

⁵⁷ Rogers op cit. n55 at 88.

⁵⁸ Rogers op cit. n55 at 89.

⁵⁹ Rogers op cit. n55 at 88.

from the central dispatch unit may hail another cab.⁶⁰ The dispatched cab would thus lose out on the fare.⁶¹

The Uber App has eliminated these search costs by providing technology that links riders to drivers operating nearby. A rider need only sit back and watch the driver approach using the Uber App's tracking function. In addition, the Uber App manages supply in high-demand areas, such as the airport, by only permitting a certain amount of drivers to queue in such areas.⁶² Furthermore the Uber, and companies like it, have seemingly reduced the risks traditionally associated with transacting with strangers. Importantly, by verifying and clearing the payment between drivers and riders, Uber arguably facilitates transactions that may otherwise not occur due to the lack of trust between strangers.⁶³

In addition, it has been argued that Uber's feedback and rating function encourages good behaviour amongst riders and drivers alike.⁶⁴ Although riders and drivers cannot select who they wish to transact with (Uber automatically pairs riders with drivers nearby) the Uber App manages which parties can remain on the Uber App according to their rating level. Accordingly, a driver that regularly drives recklessly and is disrespectful to riders is likely to fall below Uber's minimum requirements due to negative ratings from customers. Likewise, a rider that routinely gets drunk and throws up in a driver's car and barks obscenities at drivers may be deactivated from the Uber App.⁶⁵

Thus, on the face of it, Uber has significantly reduced the barriers associated with the traditional taxi sector. For riders, this means lower fares and a more efficient means of getting from A to B without worrying about long waits, fraud or

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Uber SA v NUPSAW* supra n22 at 15.

⁶³ Adam Thierer, Chris Koopman, Anne Hobson and Chris Kuiper 'How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the Lemons Problem' (2016) 70 Miami L. Rev 830 at 863.

⁶⁴ Thierer et al op cit. n63 at 868.

⁶⁵ 'Uber Community Guidelines' *Uber Website* available at <https://www.uber.com/en-AU/legal/community-guidelines/ssa-en/> accessed on 9 February 2019.

abuse. For drivers, this is seemingly an easier access of earning income as the Uber App is seen to facilitate transactions that might otherwise not occur.

II. THE PARTIES TO THE 'UBERFIED' WORK RELATIONSHIP

In the absence of having sight of Uber's company structure, the task of defining Uber as a corporate entity is a difficult task, it is likely that Uber has a complex company structure through which it operates globally. In *Uber SA v NUPSAW*⁶⁶ the Labour Court notes that there is a distinction between Uber BV, the company that owns and operates the Uber App, and Uber SA, a company that provides support and maintenance services to Uber BV.⁶⁷ In the cases of *O'Connor v Uber*⁶⁸ and *Razak v Uber*⁶⁹ the party cited as being the owner and operator of the Uber App is Uber Technologies Inc. ("**Uber Inc.**"). It is not crucial to this study to pinpoint the exact corporate entity that owns and operates the Uber App. However, for the sake of clarity any reference to 'Uber' in this dissertation is a reference to the entity that owns and operates the Uber App (whether that is Uber BV, Uber Inc. or another corporate entity altogether).

Uber distinguishes between three categories of relationship. The first category is the 'partner-driver' which refers to a partner of Uber who owns one or more vehicles, which have been registered under his or her profile on the Uber App, and who has registered with Uber as a driver and is authorised to make use of the Uber App to complete rides. The second category refers to 'drivers' only. These are individuals who do not own their own vehicles, but instead complete rides using vehicles owned by Uber 'partners', discussed below. Uber 'drivers' are registered as drivers on the Uber App and are authorised by Uber to complete rides. The final category is Uber 'partners'. This category is made up of individuals that own one or more vehicles that have been registered with Uber but do not drive for Uber. Uber 'partners' typically contract with drivers in the 'driver' category. The nature and content of these contracts may vary. This study is concerned only with the first

⁶⁶ *Uber SA v NUPSAW* supra n22.

⁶⁷ *Uber SA v NUPSAW* supra n22 at 31.

⁶⁸ *O'Connor v Uber* supra n27.

⁶⁹ *Razak v Uber* supra n28.

category, namely ‘partner-drivers’ and accordingly any reference to ‘driver’ or ‘Uber driver’ in this dissertation is a reference to this category unless the contrary is expressly stated.

An driver (being either a ‘partner-driver’ or a ‘driver’) who wants to become an Uber driver is met with the following message upon entering Uber’s webpage –

‘Uber needs **partners** like you.

Drive with Uber and earn great money as an **independent contractor**. Get paid weekly just for helping our community of riders get rides around town. **Be your own boss** and get paid in fairs for **driving on your own schedule**’ [emphasis added]

Accordingly, from the get-go Uber is careful to make it clear that the relationship between itself and its drivers is not one of employment but rather a ‘partnership’ between itself and its drivers albeit with Uber calling most of the shots. The ‘pull’ of working for Uber is that Uber drivers are encouraged to be their own bosses, set their own schedules and (allegedly) make a whack of cash doing it. The extent to which this is an accurate reflection of the uberfied work relationship is examined in the following Chapters.

III. THE ‘ON-BOARDING’ AND ‘ACTIVATION’ PROCESS

To be activated on the Uber App, an Uber driver must undergo the following ‘on-boarding process’, which appears from the judgment of Judge Andre van Niekerk in *Uber SA v NUPSAW*⁷⁰ and Judge Chen in *O’Connor v Uber*,⁷¹ respectively –

- the Uber driver must create a profile on the Uber website by registering a username and password;⁷²
- in the course of the online registration process, the Uber driver is required to agree to Uber’s driver privacy statement and thereafter

⁷⁰ *Uber SA v NUPSAW* supra n22.

⁷¹ *O’Connor v Uber* supra n27.

⁷² *Uber SA v NUPSAW* supra n22 at 11.

receives an SMS prompt to upload his or her valid South African driver's license and a professional driver's permit onto his profile;⁷³

- once the documentation furnished by the driver has been verified by Uber the driver receives an email, generated by Uber, informing him or her of the next steps;⁷⁴
- having completed the online registration process, the driver is required to attend a driving competency test and screening process conducted by a third party service provider.⁷⁵ This competency test essentially entails to a background check, city knowledge exam, vehicle inspection and a personal interview.⁷⁶ The competency and screening process is paid for by the Uber driver;⁷⁷
- Thereafter, the driver is invited to attend an information session which is a two hour session that takes place at one of Uber's local offices.⁷⁸ Drivers are provided with information on how to operate the Uber App and how to use navigation using Google maps amongst others.⁷⁹ In addition, Uber provides 'suggestions and best practices on how to maintain good ratings from riders' amongst others.⁸⁰

In order to be 'activated' a driver must agree to be bound by Uber's standard terms and conditions contained in its services agreement and driver addendum. The material terms of this agreement include, *inter alia*, –

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid*; See also, 'Onboarding Process: How to Create Your Profile' *Uber Webpage* available at <https://www.uber.com/en-ZA/drive/cape-town/get-started/competency-test-and-screening-session/>, accessed on 9 February 2019.

⁷⁶ *O'Conner v Uber* supra n27 at 12.

⁷⁷ The Uber Webpage states that a driver is required to bring R300 to cover the costs of the onboarding requirements (eg screening check, driving evaluation etc.); see 'Onboarding Process: How to Create Your Profile' op ci. n77.

⁷⁸ *Uber SA v NUPSAW* supra n22 at 12.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

- Uber does not control or direct the drivers in the performance of transportation services or the maintenance of the driver's vehicle;⁸¹
- the drivers retain the right to determine how long and how often they will use the Uber App;⁸²
- 'Uber does not guarantee drivers a minimum of riders';⁸³
- Uber drivers remain solely responsible for generating his or her own income and managing his or her own expenses;⁸⁴
- Uber drivers retain the right to provide transportation services to other companies;⁸⁵
- the parties to the agreement expressly agree that the relationship created between them is that of a principal and an independent contractor;⁸⁶
- in particular, the parties agree that the services agreement concluded between them is not an employment contract nor does it create an employment relationship between Uber and the driver.⁸⁷

The credit or debit card details of each rider are stored on his or her profile on the Uber App.⁸⁸ Uber facilitates the payments between drivers and riders by deducting the fares from the rider using the details provided by him or her.⁸⁹ The fares accumulated by a driver are transferred from Uber to the Driver's nominated bank account on a weekly basis with Uber deducting a 20 percent management fee

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Uber SA v NUPSAW* supra n22 at 13.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Uber SA v NUPSAW* supra n22 at 12.

⁸⁷ *Ibid.*

⁸⁸ *Uber SA v NUPSAW* supra n22 at 13.

⁸⁹ *Ibid.*

in respect of each ride completed by the driver.⁹⁰ The fares are calculated on the basis of the distance travelled by the rider and the duration of the ride.⁹¹ These fares are set unilaterally by Uber with no input from drivers.⁹²

Riders and drivers rate each other by using the Uber App's feedback and rating system. At the end of a trip, riders and drivers are invited to give each other a rating from one to five. Uber's 'Community Guidelines' stipulate that riders can be deactivated from the Uber App if they damage drivers' or other passengers' property, use abusive language or gestures or break the law whilst using Uber, amongst others.⁹³ Likewise, drivers will be deactivated from the Uber App either permanently or temporarily if their rating falls below the minimum standards prescribed by Uber.⁹⁴ The driver's rating takes into account the scores given to the driver by riders as well as his or her acceptance and cancellation rates.⁹⁵ Accordingly, a driver that frequently accepts and cancels rides, before collecting a rider, will be assigned a lower overall score.⁹⁶

It will be argued in the chapters that follow that many of the aspects of the uberfied work relationship seem to point to an employment relationship whereas others do not. The extent to which Uber's rating and feedback function affords the company significant control over the manner in which its drivers perform their transportation services has been the subject of debate in the US. On the one hand, it has been suggested that function effectively renders Uber drivers observable at all times.⁹⁷ On the other hand, this function has been interpreted as a mechanism intended to ensure the quality of service provided by Uber and the safety of its riders.⁹⁸ In terms of the latter view, the nature of the relationship between Uber and

⁹⁰ *Ibid.*

⁹¹ *O'Connor v Uber* supra n27 at 4.

⁹² *Ibid.*

⁹³ 'Uber Community Guidelines' op cit. n65.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *O'Connor v Uber* supra n27 at 24.

⁹⁸ *Razak v Uber* supra n28 at 30.

its drivers is more akin to the relationship between a homeowner and a subcontractor engaged in the renovation of a house.⁹⁹ The homeowner may impose certain requirements upon the subcontractor which only subsist while the subcontractor is in the home 'and certainly do not suffice to conclude that [the subcontractor] is an employee' of the homeowner.¹⁰⁰

The remainder of this study is dedicated to determining whether the 'uberfied' work relationship is something that falls within the ambit of traditional employment. The question of whether Uber drivers are employees or independent contractors is examined in the following Chapters.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

CHAPTER 3: LABOUR LAW IN THE US

There have been a number of cases in the US which have dealt with the question of whether drivers for on-demand ride hailing companies, such as Uber and Lyft, are employees or independent contractors. The most notable of these cases are *O'Connor v Uber*,¹⁰¹ *Razak v Uber*¹⁰² and *Cotter v Lyft*.¹⁰³

These cases are discussed in further detail in Chapter Four. The purpose of this Chapter Three is to provide a legal framework within which to analyse the US cases involving Uber, and its competitor Lyft. Part I provides an overview of the doctrine of at-will employment.

Part II examines the relevant provisions of the Fair Labor Standards Act (“**FLSA**”)¹⁰⁴, the National Labor Relations Act (“**NLRA**”)¹⁰⁵ and Title VII of the Civil Rights Act (as amended) (“**Title VII**”).¹⁰⁶ These statutes have been incorporated into the United States Code (“**US Code**”), which is prepared and published by the Office of the Law Revision Counsel of the US House of Representatives and contains the general and permanent laws of the US.¹⁰⁷ In addition, Part II of this chapter sets out the various tests that have been developed at common law to distinguish between employees and independent contractors.

Part III summarises the challenges faced by the US labour system in responding to the problem of worker classification in the on-demand economy. It will be argued that the multiplicity of common law tests applied in the US together

¹⁰¹ *O'Connor v Uber* supra n27.

¹⁰² *Razak v Uber* supra n28.

¹⁰³ *Cotter v Lyft* supra n29.

¹⁰⁴ 8 Fair Labor Standards, 29 U.S.C. Sec. 201 to 219 (2018), *Cornell Law School Legal Information Institute*, available at <https://www.law.cornell.edu/uscode/text/29/chapter-8>.

¹⁰⁵ 7 Labor Management Relations, 29 U.S.C. Sec. 151 – 169 (2018) *Cornell Law School Legal Information Institute*, available at <https://www.law.cornell.edu/uscode/text/29/chapter-7>.

¹⁰⁶ 21 Civil Rights, 42 U.S.C. § 2000e-2000e-17 (2018) *Cornell Law School Legal Information Institute*, available at <https://www.law.cornell.edu/uscode/text/42/chapter-21>.

¹⁰⁷ ‘About the United States Code and this Website’ *Office of the Law Revision Counsel: United States Code*, available at http://uscode.house.gov/about_code.xhtml accessed on 27 December 2018.

with the fact that the factors applied in these tests make the task of classifying Uber drivers.

I. THE DOCTRINE OF AT-WILL EMPLOYMENT

At will-employment is the default rule in all US states except for Montana¹⁰⁸ and is widely accepted as the 'governing principle' of the US labour markets.¹⁰⁹ In terms of the doctrine of at-will employment, an employment contract that does not stipulate a termination date is presumed to be for an indefinite period and may be terminated 'at-will' and without reason.¹¹⁰ The doctrine is premised on the notion that the employment relationship is voluntary and both the employer and the employee have equal leverage to negotiate the terms of the employment contract, as Means and Seiner note 'the right to fire is equivalent to the right to quit'.¹¹¹

In theory, the right to quit guarantees that workers own their own labour and are able to sell their labour on the market for the highest value.¹¹² On the other end of the spectrum, at-will employment affords employers the right to hire and fire 'at-will' and 'as the economy waxes and wanes, thus maximizing the economic efficiency of their operations'.¹¹³

The doctrine should be viewed within its historical context though. The idea that the principle of freedom of contract should come to surpass the paternalistic master-servant view of employment, in terms of which the master is responsible for the well-being of the servant, arose in response to economic and social changes in the US during the end of the 19th century.¹¹⁴ As the US became more industrialised, employers needed the flexibility to adjust the size of their labour force in order to

¹⁰⁸ 'The At-Will Presumption and Exceptions to the Rule', *National Conference of State Legislatures*, available at <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> accessed on 27 December 2018.

¹⁰⁹ Benjamin Means and Joseph A Seiner, 'Navigating the Uber Economy' (2016) 49 *U.C.D. L. Rev.* 1511.

¹¹⁰ Cheryl S. Massingale, 'At-Will Employment: Going, Going...', 24 *U. Rich. L. Rev.* (1990) 187 at 187.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Means and Seiner op cit. n109 at 1520.

¹¹⁴ Massingale op cit. n110 at 188.

meet changing market demands.¹¹⁵ Against this background, Massingale asserts that the doctrine is perhaps best understood as an expression of the principle of freedom of enterprise as opposed to the principle of freedom of contract.¹¹⁶

However, the employer's right to terminate the employment relationship 'at-will' and without reason has been significantly curtailed by the development of statutory and common law exceptions to the default rule.¹¹⁷ For example, at common law an employee may be compensated for wrongful discharge where an employer dismisses the employee for a reason that is contrary to public policy.¹¹⁸ In addition, the US courts have recognised that an employer's conduct (whether by way of practice or policy) may imply that a permanent contract of employment, terminable only on just cause shown by the employer, has been established between the parties notwithstanding the conclusion of an at-will agreement between them.¹¹⁹

These exceptions operate in recognition that more often than not the economic reality of the labour market is such that employees do not enjoy the same level of flexibility as employers and accordingly do not sit at the negotiating table with equal leverage to negotiate fair terms for their employment.¹²⁰

II. US LABOUR LEGISLATION AND THE COMMON LAW TESTS OF EMPLOYMENT

The legislative and judicial interventions discussed in Part I protect employees from being treated as 'at-will' employees by employers where the substance of the relationship or fairness dictates that they should not be. The problem of disguised employment is obviously not unique to the at-will employment scenario and with the advent of statutory and judicial interventions aimed at protecting employees in unfair dismissal claims, employers and employees alike have generally become savvier in

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Nicole B. Porter, 'The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause', (2008) 87 *Neb. L. Rev.* 62.

¹¹⁸ Porter op cit. n117 at 67.

¹¹⁹ *Ibid.*

¹²⁰ Means and Seiner op cit. n109 at 1522.

negotiating at-will employment contracts.¹²¹ A scenario that is arguably more prevalent is the case of employers misclassifying workers as independent contractors in order to maintain economic flexibility and to side-step the costs associated with traditional employment.¹²²

In the US, employee status is the golden ticket to a suite of employment legislation that was enacted at federal and state levels during the course of the 20th century to protect employees from the whims of employers and/or the vagaries of the market. The NLRA, which was enacted in 1935, regulates collective bargaining and unfair labour practices. In terms of section 157 US Code employees have the right to form and join labor organisations and to collectively bargain through representatives of their choosing.

In terms of section 158(1) of the US Code, it is an unfair labour practice for an employer to 'interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157'.¹²³ In addition, it is considered an unfair labour practice for an employer to discriminate against employees on the basis of their membership or non-membership in a labour organisation whether such discrimination occurs by way of the employer's hiring or firing practices or any term or condition of employment to encourage or discourage membership in any labour organization.¹²⁴ Independent contractors are expressly excluded from the definition of employee under the NLRA.¹²⁵

The FLSA is a federal law that was enacted in 1938 at the tail end of the Great Depression in order to alleviate the harsh conditions that workers had been made to endure.¹²⁶ The FLSA establishes –

'minimum wage, overtime pay eligibility, record keeping, and child labor standards affecting full time and part-time workers in the private sector and federal, state and local governments'.¹²⁷

¹²¹ Porter op cit. n117 at 67.

¹²² Means and Seiner op cit. n109 at 1513.

¹²³ 7 Labor Management Relations, 29 U.S.C. s158 (2018).

¹²⁴ *Ibid.*

¹²⁵ 7 Labor Management Relations, 29 U.S.C. s152(3) (2018).

¹²⁶ Erica E. McCabe 'Not like the Others: Applying the Fair Labor Standards Act to the Sharing Economy' (2016) 65 *U. Kan. L. Rev.* 145 at 148.

The FLSA defines an employee as ‘any individual employed by an employer’,¹²⁸ and an ‘employer’ is defined as ‘any person acting directly or indirectly in the interest of an employer in relation to an employee’.¹²⁹ The definition of ‘employ’ in the FLSA includes ‘to suffer or permit to work’¹³⁰ and is purposefully broad in order to prevent employers from manipulating the work relationship in order to avoid the costs and obligations associated with traditional employment.¹³¹ A person ‘suffers or permits’ an individual to work if, as a matter of economic reality, the individual is dependent on that person.¹³² Title VII prohibits dismissals on the basis of race, colour, religion, sex or national origin.¹³³ Only certain employees, falling within the ambit of Title VII, are entitled to bring discrimination, harassment or retaliation claims under the act.¹³⁴

Historically, the legislature justified the exclusion of independent contractors from employment legislation on the basis that employees were, by contrast, typically less skilled and lacked the flexibility to sell their labour on the open market and were consequently more vulnerable and in need of legislative protection as a result.¹³⁵ The archetype of an independent contractor is as an entrepreneur with specialised skills who is able to demand higher pay on the open market for the services provided by him or her.¹³⁶

¹²⁷ ‘Fair Labor Standards Act (FLSA), *Office of Financial Management Website* available at <https://ofm.wa.gov/state-human-resources/compensation-job-classes/compensation-administration/fair-labor-standards-act-flsa>, accessed on 19 January 2019.

¹²⁸ 8 Fair Labor Standards, 29 U.S.C. § 203(e)(1)(2018).

¹²⁹ 8 Fair Labor Standards, 29 U.S.C. §203(d) (2018).

¹³⁰ 8 Fair Labor Standards, 29 U.S.C. §203(5) (2018).

¹³¹ Means & Seiner op cit. n109 at 1526.

¹³² David Weil, ‘Administrator’s Interpretation No. 2015- 1’ (2015) *US Department of Labor* at 3 4; See also, *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) at 929.

¹³³ 21 Civil Rights, 42 U.S.C. § 2000e-2(a)(1) (2018); See also, Porter op cit. n117 at 69.

¹³⁴ Ashley L. Crank, ‘O’Connor v Uber Technologies Inc.: The Dispute Lingers – Are Workers in the on-Demand Economy Employees or Independent Contractors?’ (2016) 39 *Am. J. Trial Advoc.* 609 at 613.

¹³⁵ Pearce & Silva op cit. n34 at 13.

¹³⁶ Pearce & Silva op cit. n34 at 12.

However, Means and Seiner note that in a pre-modern economy the question of who was an employee would have been fairly obvious in most circumstances.¹³⁷ As the US became more industrialised and employers began to shift from traditional employment the picture became less clear. Accordingly, the US courts developed a number of tests to determine whether a worker is an employee or an independent contractor, properly construed, and thus entitled to the rights and protections afforded by federal and state legislation.

The common law tests find application depending on the statute and jurisdiction in question in a particular case.¹³⁸ The most widely used tests are, the common law 'right-to-control' test or the 'agency' test, the 'economic realities' test, the 'hybrid' test and the International Revenue Service's twenty factor test ("IRS test"), which is primarily used for tax cases.¹³⁹

The common law 'right-to-control' test is the primary test applied to the classification of workers in the US and is applicable 'in any situation related to employment where no statutory definition of employment has been given or where the given definition is only nominal'.¹⁴⁰ The Restatement (Second) of Agency¹⁴¹ ("Restatement") is the predominant articulation of the common law test and defines an 'employee' as –

'a servant hired to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.'¹⁴² [emphasis added]

The Restatement provides the following non-exhaustive list of ten factors to consider in determining whether a worker is an employee or an independent contractor:

- (1) the extent of control which, by agreement, the master may exercise over the details of the work;

¹³⁷ Means and Seiner op cit. n109 at 1524.

¹³⁸ Pearce & Silva op cit. n34 at 15.

¹³⁹ Pearce & Silva op cit. n34 at 8 - 9.

¹⁴⁰ Pearce & Silva op cit. n34 at 7 - 8.

¹⁴¹ Restatement (Second) of Agency s220 (2)(a)-(j) (1958).

¹⁴² *Ibid.*

- (2) whether or not the one employed is engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) the length of time for which the person is employed;
- (7) the method of payment, whether by time or by the job;
- (8) whether or not the work is a part of the regular business of the employer;
- (9) whether or not the parties believe they are creating the relation of master and servant; and
- (10) whether the principal is or is not in business.¹⁴³

The factors are to be considered simultaneously and balanced against each other with no single factor being definitive.¹⁴⁴ The overarching enquiry is ‘whether the employer retains the right to control the manner and means by which the product is accomplished.’¹⁴⁵

The ‘economic realities’ test, like the ‘right-to-control’ test, considers the extent to which the employer controls or has the right to control the manner in which the work is performed, but also looks to the extent to which the workers are economically dependent on the employer’s business.¹⁴⁶ The purpose of the test is to determine whether the economic reality of the work relationship is such that the worker is economically dependent on the employer or whether the worker is in business for himself, as an independent contractor.¹⁴⁷

The courts consider the following six factors in applying the ‘economic realities’ test:

- (1) the degree of control exerted by the alleged employer over the worker;
- (2) the worker’s opportunity for profit or loss;

¹⁴³ Restatement (Second) of Agency Sec. 220 (2)(a)-(j) (1958); See also, *Nationwide Mut. Ins. Co. v Darden*, 503 U.S. 318 at 323-324.

¹⁴⁴ Catharine Tucciarello, ‘The Square Peg between Two Round Holes: Why California’s Traditional Right to Control Test is Not Relevant for on-Demand Workers’ (2017) 13 *Seton Hall. Cir. Rev.* 351 at 355.

¹⁴⁵ *Ibid*; See also, *Cmity. for Creative Non-Violence v Reid*, 490 U.S. 730, 751-752 (1989).

¹⁴⁶ Tucciarello op cit. n144 at 358; See also, *Baker v Flint Eng’g & Constr. Co.* 137 F.3d 1436, 1440 (10th Cir. 1998).

¹⁴⁷ McCabe op cit. n126 at 151.

- (3) the worker's investment in the business;
- (4) the permanence of the working relationship;
- (5) the degree of skill required to perform the work; and
- (6) the extent to which the work is an integral part of the alleged employer's business.¹⁴⁸

The 'hybrid' test is a combination of the common law 'right-to-control' test and the 'economic realities' test.¹⁴⁹ In terms of the 'hybrid' test, although the economic reality of the work relationship is critical, the employer's right to control the work process is the determining factor.¹⁵⁰ In assessing the extent of the employer's right of control, the court's will examine a number of factors including the six factors of the 'economic realities' test¹⁵¹ and 'the putative employer's right to hire and fire, supervise, and control the worker's work schedule'.¹⁵²

The IRS test is used to determine employment status for the purposes of withholding taxes. One of the driving factors for misclassifying workers as independent contractors is the fact that employers are not responsible for withholding income taxes, withholding and paying Social Security and Medicare taxes or paying unemployment taxes on wages to employees, in respect of independent contractors.¹⁵³ The twenty factors have been divided into three categories namely behavioural, financial and type of relationship.¹⁵⁴

The abovementioned tests are those most commonly applied to the interpretation of federal employment statutes. It has been said above that the type of test that will be applied will depend on the statute and the jurisdiction in question.¹⁵⁵ The Supreme Court has confirmed that the common law 'right-of-

¹⁴⁸ *Ibid.*

¹⁴⁹ Pearce & Silva op cit. n34 at 9.

¹⁵⁰ Crank op cit. n134 at 614.

¹⁵¹ Pearce & Silva op cit. n34 at 9.

¹⁵² Crank op cit. n134 at 614.

¹⁵³ Tucciarello op cit. n144 at 356.

¹⁵⁴ 'Independent Contractor (Self-Employed) or Employee?', *IRS Webpage*, available at <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employed>, accessed on 19 January 2019.

¹⁵⁵ Pearce & Silva op cit. n34 at 15.

control' test is to be applied where 'no statutory definition of employment has been given or where the given definition is only nominal'.¹⁵⁶

The Supreme Court has further confirmed that the more expansive 'economic realities' test as opposed to the common law 'right-to-control' test is to be applied to cases concerning the rights afforded under the FLSA.¹⁵⁷ This is because the FLSA, unlike other employment statutes, contains a more expansive statutory definition of employment.¹⁵⁸ The legislature intended the FLSA to have the widest application to include workers who would not been considered 'employees' prior to its enactment.¹⁵⁹ However, Pearce and Silva note that despite the Supreme Court's pronouncement on when the 'right-to-control' test is to be applied, the common law tests are often applied inconsistently by the courts.¹⁶⁰ Pearce and Silva argue that this has led to confusion and ambiguity with regard to the legal classification of workers in the US.¹⁶¹

To add to the confusion, many states make use of different tests to determine whether workers are employees or independent contractors. It is beyond the scope of this dissertation to provide a detailed analysis of the common law tests applied in the various jurisdictions. The courts in *O'Connor v Uber*¹⁶² and *Cotter v Lyft*¹⁶³ applied the test established in *Borello & Sons v Dep't of Industrial Relations*¹⁶⁴ to determine whether the drivers were employees or independent contractors ("the **Borello test**").¹⁶⁵ Recently however, the California Supreme Court rejected the *Borello* test and applied the 'ABC' Test in the case of *Dynamex Operations West*,

¹⁵⁶ Pearce & Silva op cit. n34 at 7 - 8. See also, *Darden supra* n143 at 322-323.

¹⁵⁷ Pearce & Silva op cit. n34 at 16; See also, *Walling v. Portland Terminal Co.*, 330 U.S. 148, (1947) at 150-51; See also, *Darden supra* n143 at 326.

¹⁵⁸ Pearce & Silva op cit. n34 at 16.

¹⁵⁹ *Walling supra* 157 at 150-151.

¹⁶⁰ Pearce & Silva op cit. n34 at 16.

¹⁶¹ Pearce & Silva op cit. n34 at 15; See also, *Juino v Livingston Par. Fir Dist No. 5*, 717 F.3d 431 (5th Cir. 2013).

¹⁶² *O'Connor v Uber supra* n27.

¹⁶³ *Cotter v Lyft supra* n29.

¹⁶⁴ *S.G. Borello & Sons, Inc. v Dep't of Industrial Relations*, 769 P.2d 399, 404 (Cal. 1989).

¹⁶⁵ *O'Connor v Uber supra* n27 at 6; *Cotter v Lyft supra* n29 at 8.

*Inc. v Superior Court of Los Angeles County*¹⁶⁶ (“**Dynamex**”). The case of *Razak v Uber*¹⁶⁷ was decided in Pennsylvania accordingly the court applied the factors established in the case of *Donovan v DialAmerica Marketing Inc.*¹⁶⁸ (“**Donovan**”) (“**the Donovan Test**”). These tests are discussed in turn below.

In terms of the *Borello* test there is a presumption of employment when a worker establishes that he or she has provided services to a putative employer.¹⁶⁹ The burden then shifts to the employer to rebut the presumption of employment.¹⁷⁰ In determining whether an employer has successfully rebutted the presumption of employment the court will examine a number of factors the ‘most significant consideration’ being the employer’s right to control the manner in which the work is performed.¹⁷¹

The Supreme Court of California held in *Borello* that the right need not extend to every possible detail of the work instead the enquiry is whether the employer retains ‘all necessary control’ over the manner in which the work is performed.¹⁷² The court further held that the employer’s right to discharge at will and without cause is strong evidence in support of the existence of an employment relationship between the parties.¹⁷³ In addition to the employer’s right to control the court identified the following ‘secondary indicia’ –

- a) whether the one performing services is engaged in a distinct occupation or business;
- b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- c) the skill required in the particular occupation;
- d) whether the principal or the worker supplies the instrumentalities, tool, and the place of work for the person doing the work;

¹⁶⁶ *Dynamex Operations West, Inc. v Superior Court of Los Angeles County* 4 Cal.5th 903 (2018).

¹⁶⁷ *Razak v Uber* supra n28.

¹⁶⁸ *Donovan v DialAmerica Marketing Inc.*, 757 F. 2d 1376 (3d Cir, 1985).

¹⁶⁹ *O’Connor v Uber* supra n27 at 6; See also, *Robinson v. George*, 105 P.2d 914, 917 (Cal.1940) at 901.

¹⁷⁰ *O’Connor v Uber* supra n27 at 6

¹⁷¹ *O’Connor v Uber* supra n27 at 6; See also, *Borello* supra n164 at 350.

¹⁷² *O’Connor v Uber* supra n27 at 7; See also, *Borello* supra n164 at 350.

¹⁷³ *Ibid.*

- e) the length of time for which the services are to be performed;
- f) the method of payment, whether by the time or by the job;
- g) whether or not the work is part of the regular business of the principal; and
- h) whether or not the parties believe that they are creating the relationship of employer-employee¹⁷⁴

The court further identified the following additional factors for consideration –

- 1) the alleged employee's opportunity for profit or loss depending on his managerial skill;
- 2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- 3) whether the service rendered requires a special skill;
- 4) the degree of permanence of the working relationship;
- 5) whether the service rendered is an integral part of the employer's business.¹⁷⁵

The Supreme Court held that the *Borello* factors are not to be applied 'mechanically as separate tests; they are 'intertwined and their weight often depends on particular combinations.'¹⁷⁶ In the case of *Narayan v EGL, Inc.*¹⁷⁷ the Ninth Circuit Court of Appeals held that the decision maker is required to –

'assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction.'¹⁷⁸

The 'ABC' test is a simplification of the common law 'right-to-control' test. The 'ABC' test is used by various states to determine the classification of workers for purposes of establishing whether an employer is obliged to pay unemployment taxes.¹⁷⁹ It will be noted that employers are not obliged to pay unemployment taxes in respect of independent contractors. In terms of the 'ABC' test, a worker is an independent contractor if the *hirer* establishes -

- a) that the worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

¹⁷⁴ *O'Connor v Uber* supra n27 at 7 -8; *Borello* supra n164 at 355.

¹⁷⁵ *O'Connor v Uber* op cit. n27 at 8; *Borello* supra n164 at 355.

¹⁷⁶ *Borello* supra n164 at 351.

¹⁷⁷ *Narayan v EGL Inc.*, 616 F.3d 895.

¹⁷⁸ *Narayan* supra n177 at 901.

¹⁷⁹ Karen R. Harned, Georgina M. Kryda & Elizabeth A. Milito, 'Creating A Workable Legal Standard for Defining an Independent Contractor', (2010) 4 *J. Bus. Entrepreneurship & L.* 93 at 102.

- b) that the worker performs work that is outside the usual course of the hiring entity's business; and
- c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.¹⁸⁰

Unlike the '*Borello* test', in terms of which the onus of proving an employment relationship rests firstly with the worker, the ABC Test proceeds from the assumption that the worker is an employee. It is thus for the hirer to establish that the employee is an independent contractor. It can therefore be argued that the 'ABC' test places a heavier burden on hirers and is more pro-employee in comparison to other common law tests.

Although *Dynamex*¹⁸¹ does not concern Uber or Lyft drivers but rather drivers for a same day delivery company, it is useful to the present study because the finding of the Supreme Court California has set a precedent in employee misclassification disputes which will render it far more difficult for hirers to classify workers as independent contractors.¹⁸² The response from government and the private sector is telling. The week after the *Dynamex* decision was handed down, US Senator Bernie Sanders introduced a bill that would establish an ABC Test equivalent as the standard for federal labour laws.¹⁸³ It has been reported that businesses and the Chamber of Commerce have been lobbying congressional offices to blunt the impact of the bill.¹⁸⁴

In Pennsylvania, the seminal case for determining whether a worker is an employee for the purposes of the FLSA is *Donovan*¹⁸⁵ in which the court established

¹⁸⁰ *Dynamex supra* n166 at 7.

¹⁸¹ *Dynamex supra* n166.

¹⁸² John K. Skousen 'New ABC Test For Independent Contractors Sends California Employers Reeling' *Lexology* 2 July 2018 available at <https://www.lexology.com/library/detail.aspx?g=96552e33-3856-48ac-b31a-dcecc083fa00>, accessed on 9 February 2019.

¹⁸³ Josh Eidelson 'Gig Firms Want California to Override Court Ruling' *Insurance Journal*, 8 August 2018, available at <https://www.insurancejournal.com/news/west/2018/08/08/497469.htm>, accessed on 9 February 2019.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Donovan supra* n168.

six factors to determine whether an employment relationship exists between a worker and a putative employer namely –

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending on his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for his task or his employment of helpers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanence of the working relationship; and
- 6) whether the service rendered is an integral part of the alleged employer's business.¹⁸⁶

In contrast to California's *Borello* test in terms of which the primary enquiry is putative employer's right-to-control the manner and means of accomplishing the desired result, the *Donovan* factors are to be applied with a view to determining whether, 'as a matter of economic reality... individuals are dependent upon the business to which they render a service.'¹⁸⁷ A court applying the *Donovan* factors is required to 'examine the circumstances of the whole activity' with no one factor being dispositive.¹⁸⁸

III. THE US CHALLENGE – SO MANY (OUTMODED) TESTS SO LITTLE CERTAINTY

This Chapter has canvassed numerous common law tests for employment. The decision to apply one test over another depends on the statute from which the employment rights arise as well as the jurisdiction in which the dispute has arisen.¹⁸⁹ The business of classifying workers is rendered more difficult by the fact that many of these tests involve a multiple factors that, once applied, can produce conflicting results.¹⁹⁰ Moreover, many of these tests were developed during a time

¹⁸⁶ *Donovan* supra n168 at 1382.

¹⁸⁷ *Donovan* supra n168 at 1382 – 3.

¹⁸⁸ *Ibid.*

¹⁸⁹ Pearce & Silva op cit. n34 at 15.

¹⁹⁰ See, Pearce & Silva op cit. n34 at 18 for a discussion on how the application of the same common law test can lead to differing results despite similar facts. The authors discuss the cases of

when employment looked very different to the way it does today and accordingly may not speak to certain aspects of the 'uberfied' work relationship.

In the light of all these tests, it can be argued that US courts have been faced with somewhat of a legal quagmire in determining the question of whether drivers in the sharing economy are employees or independent contractors as a matter of law. It has been said that companies like Uber and Lyft have made it easier for individuals to engage in economic activity through the use of smartphone applications. However, the judgments of Judge Chen and Judge Chhabria in the cases of *O'Connor v Uber* and *Cotter v Lyft* on the one hand and Judge Baylson in *Razak v Uber* on the other, make it clear that these companies have also created a worker that seems to be more of an amalgamation between employee and independent contractor than one or the other. The question of whether Uber drivers are 'employees' under US law is critical because 'employee' status is still the threshold requirement for workers to receive protection under US law. If it is so that Uber drivers are not independent contractors, capable of holding their own in the labour market, then their exclusion from labour protections may have dire consequences for a class of potentially vulnerable workers. The following Chapter Four examines the manner in which the US courts have grappled with the classification of Uber drivers, as well as the drivers of its competitor Lyft.

FedEx Home Delivery v NLRB, 563 F.3d 492 (D.C. Cir. 2009) and *Alexander v FedEx Ground Package Sys. Inc.*, 765 F.3d 981, 997 (9th Circ. 2014).

CHAPTER 4: UBER AND LYFT IN THE US COURTS - SQUARE PEGS, ROUND HOLES

The cases of *O'Connor v Uber*¹⁹¹ and *Cotter v Lyft*¹⁹² are examined in Parts I and II of this chapter. It will be noted that both of these cases have been decided under California law, accordingly these parts are concerned with the application of the *Borello*¹⁹³ test to the relationship between Uber or Lyft and their drivers.

Part III is an analysis of Judge Baylson's judgment in *Razak v Uber*¹⁹⁴. The case was decided in Pennsylvania and accordingly, Part III includes an analysis of the application of the *Donovan*¹⁹⁵ test to the relationship between Uber and the Uber drivers in that case.

I. O'CONNOR V UBER TECHNOLOGIES INC.¹⁹⁶

a) Background

The case of *O'Connor v Uber*¹⁹⁷ has wound its way through the US courts since 2013 when Uber drivers filed a class action law suit in the Federal District Court for the Northern District of California alleging that they had been misclassified as independent contractors by Uber. The drivers alleged that they were employees of Uber and were accordingly entitled to the protections afforded by the California Labor Code.¹⁹⁸

The case was almost settled in 2016, when Uber agreed to a \$100 000 000 settlement of the misclassification claims.¹⁹⁹ Pursuant to the settlement agreement,

¹⁹¹ *O'Connor v Uber* supra n27.

¹⁹² *Cotter v Lyft* supra n29.

¹⁹³ See, Chapter Three Part II; *Borello* supra n164.

¹⁹⁴ *Razak v Uber* supra n28.

¹⁹⁵ See, Chapter Three Part II; *Donovan* supra 168.

¹⁹⁶ *O'Connor v Uber* supra n27.

¹⁹⁷ *O'Connor v Uber* supra n27.

¹⁹⁸ *O'Connor v Uber* supra n27 at 1.

¹⁹⁹ Tracey Lien, 'Uber Will Pay up to \$100 Million to Settle Suits with Drivers Seeking Employee Status', *LA Times*, 21 April 2016 available at <https://www.latimes.com/business/technology/la-fi-tn-0422-uber-settlement-story.html>, accessed on 20 December 2018.

Uber agreed to implement a number of policy changes including the recognition of a Driver Association with which Uber agreed to engage in discussions regarding issues of driver concern on a quarterly basis²⁰⁰. It was further agreed that Uber would not be able to deactivate drivers at will instead drivers could only be deactivated for just cause, excluding low acceptance rates.²⁰¹ Finally, it was agreed that Uber drivers would be permitted in terms of the agreement to place signs in their cars notifying riders that tips are not included, but are appreciated.²⁰² However, the settlement was rejected by the federal judge on the basis that it was not fair adequate and reasonable.²⁰³

The Ninth US Circuit Court of Appeals has recently reversed the class certification order in the case of *O'Connor v Uber*²⁰⁴ on the basis that the arbitration clause in Uber's partner-driver agreements prohibits class action suits.²⁰⁵ In the circumstances, those drivers cited in the class action suit have been urged to sign up for individual arbitration.²⁰⁶

However, notwithstanding the fact that the case will not be heard by a jury, the findings of Judge Chen in the order denying Uber summary judgment²⁰⁷ ("**summary judgment order**") offers useful insight into the nature of the Uber partner-driver relationship and the challenge of classifying drivers in the on-demand economy. In concluding the summary judgment order, Judge Chen notes that the application of the traditional test of employment, the *Borello* test in the state of California, creates

²⁰⁰ Unknown Author 'Growing and Growing Up' *Uber Newsroom*, 21 April 2016, available at <https://www.uber.com/newsroom/growing-and-growing-up/>, accessed on 20 December 2018; Mike Isaac & Noam Scheiber, 'Uber Settles Cases with Concessions, But Drivers Stay Freelancers', *NY Times*, 21 April 2016, available at <https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html>, accessed on 20 December 2018.

²⁰¹ *Ibid.*

²⁰² *Lien op cit.* n199.

²⁰³ Davey Alba, 'Judge Rejects Uber's \$100 Million Settlement with Drivers', *Wired*, 18 August 2016, available at <https://www.wired.com/2016/08/uber-settlement-rejected/>, accessed on 20 December 2018.

²⁰⁴ *O'Connor v Uber* *supra* n27.

²⁰⁵ Andrew J Hawkins, 'Uber Scores Big Win in Fight to Keep Drivers as Independent Contractors', *The Verge*, 25 September 2015, available at <https://www.theverge.com/2018/9/25/17901284/uber-drivers-independent-contractors-vs-employees-legal-fight> accessed on 20 December 2018.

²⁰⁶ *Ibid.*

²⁰⁷ *O'Connor v Uber* *supra* n n27.

‘significant challenges’ as many of the *Borello* factors appear to be ‘outmoded’ in the context of the sharing economy.²⁰⁸

b) Application of the ‘Borello test’

There are effectively two legs to the *Borello* test. In terms of the first leg, there is a presumption of employment where an individual establishes that he or she provides a service to the putative employer.²⁰⁹ Thereafter the court will consider the ‘Borello factors’ to determine whether the employer can nevertheless rebut the presumption of employment.²¹⁰

Judge Chen found that the drivers did provide a service to Uber and were accordingly presumptive employees in terms of the ‘Borello test’.²¹¹ In reaching this conclusion Judge Chen rejected Uber’s argument that the drivers did not provide a service to the company because it was not a ‘transportation company’, as alleged.²¹² Uber argued instead that it was a ‘pure “technology company” that merely generated “leads” for its transportation providers through its software’.²¹³ Judge Chen found that this argument was ‘fatally flawed’ in several respects.²¹⁴

First, the Judge rejects Uber’s argument that it was a ‘pure “technology company”’ on the basis that it focuses exclusively on the ‘mechanics of its platform’ and ignores the substance of what the company actually does, namely sells rides.²¹⁵ In this regard, Judge Chen held as follows –

‘Uber is no more a “technology company” than Yellow Cab is a “technology company” because it uses CB radios to dispatch taxi cabs, John Deere is a “technology company” because it uses modern irrigation techniques to grow its sugar cane. **Indeed, very few (if any) firms are *not* technology companies if one focuses solely on *how* they create or distribute their products.** If, however, the focus is on the substance of what the firm actually does (e.g. sells cab rides, lawnmowers, or sugar), it is clear that **Uber**

²⁰⁸ *O’Connor v Uber supra* n27 at 27.

²⁰⁹ *O’Connor v Uber supra* n27 at 6.

²¹⁰ *Ibid.*

²¹¹ *O’Connor v Uber supra* n27 at 15.

²¹² *O’Connor v Uber supra* n27 at 10.

²¹³ *O’Connor v Uber supra* n27 at 10.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

is most certainly a transportation company, albeit a technologically sophisticated one²¹⁶ [my emphasis added]

Second, the fact that Uber's revenues depend almost exclusively on the generation of rides by its drivers lends itself to a finding that the drivers do perform a service for Uber.²¹⁷ Judge Chen held that 'Uber simply would not be a viable business entity without its drivers'.²¹⁸

Third, the fact that Uber unilaterally sets the fares that it charges riders, without consulting or negotiating the fares with drivers, was further evidence in favour of the fact that the drivers performed a service for Uber.²¹⁹ In this regard, the Judge found that Uber acted as more than a 'mere passive intermediary between riders and drivers'.²²⁰

Fourth, the Judge found that Uber 'exercises substantial control over the qualification and selection of its drivers'.²²¹ This, the court held, constituted further indicia of Uber's role as a transportation company as opposed to a software provider.²²² In particular, the Court took into consideration the fact that Uber conducted background checks in respect of its drivers and their vehicles and regularly terminated drivers who did not meet these standards.²²³

Ultimately, Judge Chen refused Uber's application for summary judgment and held that the matter would need to be referred to trial to be decided by a jury.²²⁴ Uber would only have been entitled to summary judgment if no material facts remained in dispute and a reasonable jury considering the undisputed facts could reach one conclusion being that the drivers were independent contractors as a matter of law.²²⁵ In this regard, the court held that the question of whether Uber

²¹⁶ *Ibid.*

²¹⁷ *O'Connor v Uber* supra n27 at 11.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *O'Connor v Uber* supra n27 at 12.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *O'Connor v Uber* supra n27 at 27.

²²⁵ *O'Connor v Uber* supra n27 at 20.

could terminate the driver's services as well as the extent to which Uber had the right to 'significantly control the "manner and means" of the [driver's] transportation services' remained in dispute.²²⁶

In terms of the *Borello* test, the primary test of employment is whether the putative employer has the right to control the manner and means of accomplishing the desired result. In the case of *Ayala v Antelope Valley Newspapers*²²⁷ the court, quoting *Borello*²²⁸, held that the strongest evidence of right to control is whether the putative employer has the right to terminate the service provider at will.

While the drivers alleged that Uber retained the right to deactivate them at will and for any reason,²²⁹ Uber argued that it was only entitled to deactivate drivers 'with notice or upon the [driver's] material breach' of the service contracts.²³⁰ As the court ultimately referred the matter to be decided by a jury, it did not make a pronouncement as to whether Uber's right to deactivate the drivers from the Uber App amounted to termination of employment although Judge Chen considered that many of the 'Uber documents' submitted in evidence indicated that Uber regularly terminated the accounts of drivers who did not perform up to the company's standards.²³¹

The nature of the 'suggestions' provided by Uber as to the manner in which drivers are required to dress, communicate with riders, set radio stations and volume and temperature²³² were indicative of Uber's control over the manner and means in which the rides are carried out, was also disputed. The drivers alleged that the fact that Uber seeks to control these minor details of the service lends itself to a finding that Uber retains the right to, and does in fact, exercise 'significant control over the "manner and means" in which the rides are carried out. Uber

²²⁶ *O'Connor v Uber* supra n27 at 20 - 21.

²²⁷ *Ayala v Antelope Valley Newspapers* 59 Cal. 4th 552 (2014).

²²⁸ *Borello* op cit. n164 at 350.

²²⁹ *O'Connor v Uber* supra n27 at 20.

²³⁰ *Ibid.*

²³¹ *O'Connor v Uber* supra n27 at 12.

²³² *O'Connor v Uber* supra n27 at 21.

argued that these were mere suggestions and were not mandatory.²³³ The court found, without deciding, that these ‘suggestions’ could be construed as instructions which the Uber drivers were obliged to follow because they were ‘written in the language of command’²³⁴ and carried the sanction of deactivation from the Uber App if not followed.²³⁵

As to the nature of Uber’s ratings and feedback function, Judge Chen notes that contrary to Uber’s assertion that there was ‘insufficient monitoring to warrant an inference of an employment relationship’ Uber drivers are monitored quite pervasively by means of rider ratings and comments.²³⁶ In this regard the court held that Uber drivers appeared to be monitored more extensively than the drivers in *Alexander*,²³⁷ the case Uber sought to rely on in its argument, where the employees were subjected to quarterly ride-alongs conducted by FedEx management personnel.²³⁸ The court in *Alexander* held that this level of monitoring was sufficient to justify a finding that the drivers were employees of FedEx.²³⁹

The main contention put forward by Uber in support of the argument that the right-of-control factor had not been met, was the fact that Uber drivers are permitted to work as much or as little as they choose. The court considered the principle established in *Air Couriers Int’l v Employment Development Department*²⁴⁰ and *JKH Enterprises v Industrial Relations*,²⁴¹ that ‘freedom to choose one’s days and hours of work...does not in itself preclude a finding of an employment relationship’.²⁴²

As to the secondary factors of the *Borello* test, court held that ‘numerous factors point in opposing directions’.²⁴³ On one hand the fact that driving does not

²³³ *O’Connor v Uber* supra n27 at 22.

²³⁴ *O’Connor v Uber* supra n27 at 21.

²³⁵ *O’Connor v Uber* supra n27 at 23.

²³⁶ *O’Connor v Uber* supra n27 at 24.

²³⁷ *Alexander* supra n190.

²³⁸ *Alexander* supra n190 at 985.

²³⁹ *Ibid.*

²⁴⁰ *Air Couriers Int’l v Employment Development Department* 150 Cal.App. 4th 923 (2007).

²⁴¹ *JKH Enterprises v Industrial Relations* 142 Cal. App. 4th 1046 (2006).

²⁴² *Air Couriers* supra n240 at 926.

²⁴³ *O’Connor v Uber* supra n27 at 26.

require a special skill is a factor that may weigh in favour of an employment relationship.²⁴⁴ In addition, the court held that the drivers form an integral part of Uber's business, indeed Uber 'simply could not be 'Everyone's Private Driver' without the Uber drivers, which is another factor that indicates an employment relationship.²⁴⁵ On the other hand, the fact that drivers use their own vehicles and thus invest significant capital in their trade, may employ others to drive on their behalf and signed an agreement stating no employment relationship is created are all factors that point to independent contractor status.²⁴⁶

The court held that it could determine that Uber drivers were independent contractors as a matter of law, and accordingly Uber was denied its motion for summary judgment.²⁴⁷ In concluding, Judge Chen notes that the application of the *Borello* test to the relationship between Uber and its drivers 'does not yield an unambiguous result'.²⁴⁸ The Judge notes that many of the factors of the tests, which evolved under a very different economic model, appear to be 'outmoded' in the context of the sharing economy.²⁴⁹ Although this case will not be heard before a jury, the abovementioned analysis of Judge Chen is useful to the present study as it provides some insight into the nature of the 'uberfied' work relationship and the possible shortcomings of the *Borello* test.

II. COTTER V. LYFT, INC.²⁵⁰

a) Background

The case was settled during March 2017 with Lyft agreeing to a \$27 000 000 settlement of the misclassification claims as well as the implementation of certain

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *O'Connor v Uber* supra n27 at 27.

²⁴⁸ *O'Connor v Uber* supra n27 at 27.

²⁴⁹ *Ibid.*

²⁵⁰ *Cotter v Lyft* supra n29.

changes to the company's terms of service for drivers.²⁵¹ The drivers alleged that they were employees of Lyft and accordingly under California law would have been entitled to be reimbursed for their expenses, which Lyft did not do.²⁵² In addition, the drivers alleged that Lyft sometimes failed to pay the drivers minimum wage.²⁵³

As in the case of *O'Connor v Uber*,²⁵⁴ the case will not be heard before a jury. The court found that the question of whether Lyft drivers were independent contractors or employees could not be decided as a matter of law and should be decided by a jury.²⁵⁵ However, like the judgment of Judge Chen in *O'Connor v Uber*²⁵⁶ the judgment of Judge Chhabria in the order denying cross-motions for summary judgment offers valuable insight into the nature of work in the on-demand economy and the challenges of the current common law tests of employment. The oft quoted statement from the judgment neatly summarises the issue –

‘As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous.’²⁵⁷

b) Application of the ‘Borello test’

At the outset of his judgment Judge Chhabria notes that ‘at first glance, Lyft drivers don't seem much like employees... but Lyft drivers don't seem much like independent contractors either’.²⁵⁸ This statement appears to sum up the current dilemma facing drivers working for ride hailing companies in the on-demand economy. The Judge notes that typically, an employee is regarded as someone who ‘works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving more or all of his income from that one

²⁵¹ Heather Sommerville, ‘Judge approves \$27 million driver settlement in Lyft settlement’, *Reuters*, 16 March 2017 available at <https://www.reuters.com/article/us-lyft-drivers-idUSKBN16N30D>, accessed on 13 December 2018.

²⁵² *Cotter v Lyft* supra n29 at 2.

²⁵³ *Ibid.*

²⁵⁴ *O'Connor v Uber* supra n27.

²⁵⁵ *Cotter v Lyft* supra n29 at 19.

²⁵⁶ *O'Connor v Uber* supra n27.

²⁵⁷ *Cotter v Lyft* supra n29 at 19.

²⁵⁸ *Cotter v Lyft* supra n29 at 1.

employer'.²⁵⁹ Lyft drivers, by contrast, are permitted to work as much as they like, or not at all, and are able to schedule their own hours of work.²⁶⁰ In addition, a person might drive for Lyft to supplement their primary income.²⁶¹

However, the Judge notes that Lyft drivers don't seem to neatly fit the mould of an independent contractor either. Stereotypically, an independent contractor is –

‘someone with a special skill (and with the bargaining power to negotiate a rate for the use of that skill), who serves multiple clients, performing discrete tasks for limited periods, while exercising great discretion over the way the work is actually done’²⁶²

The court held that an independent contractor would be a person that a principle hired in order to perform a task that was often ‘tangential to the day-to-day operations’ of his or her business.²⁶³ Lyft drivers, by contrast, have no special skills and the work they perform is central to Lyft’s business, not tangential.²⁶⁴ In addition, although Lyft drivers can choose their own schedules the court found that Lyft exercises significant control over the manner in which the drivers perform their work including the right to deactivate drivers from the App.²⁶⁵

As to the first leg of the *Borello* test, the court rejected Lyft’s argument that the drivers do not perform a service for Lyft but rather provides services to Lyft’s riders.²⁶⁶ Lyft argued that it merely furnished drivers with the platform to connect with riders.²⁶⁷ However, the court found that this argument was ‘not a serious one’ as Lyft concerns itself with more than simply connecting drivers with riders.²⁶⁸ Instead, Lyft is seen to actively market itself to riders as an ‘on-demand ride service’ and seeks out those customers.²⁶⁹

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Cotter v Lyft* supra n29 at 1.

²⁶³ *Cotter v Lyft* supra n29 at 2.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Cotter v Lyft* supra n29 at 14.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

As to the second leg of the '*Borello* test', being the consideration of the *Borello* factors, the court held that the question of whether 'Lyft actually exercises control is less important than whether it retains the right to do so'.²⁷⁰ The court found, that notwithstanding that Lyft exercises no control over when Lyft drivers accept rides, the ride-sharing company exercises significant control over the manner in which the drivers carry out rides once the ride is accepted.²⁷¹ In addition, the fact that Lyft's 'suggestions' were written as commands and carried the sanction of deactivation or suspension from the App if not followed seemed to weigh in favour of an employment relationship.²⁷² Accordingly the court held that the primary factor, being the employer's right to control, appears to weigh in favour of employment status.²⁷³

However, with regards to the secondary indicia, the court found that many of the factors, once applied to Lyft drivers, appear to cut in opposing directions.²⁷⁴ On one hand, the fact that the parties signed an agreement which clearly stipulates that the drivers are independent contractors is a factor that supports Lyft's contention that the drivers are independent contractors.²⁷⁵ On the other hand, that drivers do not possess special skills and perform work that is "wholly integrated" into Lyft's business' would cut in favour of an employment relationship.²⁷⁶

Ultimately, the court held that it could not find that the Lyft drivers were independent contractors as a matter of law and accordingly the matter would need to be determined by a jury.²⁷⁷ In concluding, Judge Chhabria surmises that perhaps the solution to the challenge of applying the traditional California test of employment to work relationships in the on-demand economy is that 'drivers should be

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Cotter v Lyft* supra n29 at 15.

²⁷³ *Cotter v Lyft* supra n29 at 16.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Cotter v Lyft* supra n29 at 19.

considered a new category of worker altogether, requiring a different set of protections'.²⁷⁸

It has been said above that the case of *Cotter v Lyft* is useful for the present purposes because it highlights the challenges of the traditional tests of employment. What is clear from the judgment is that the nature of work has changed considerably since the time that these tests were developed. Far from a clear distinction between employees and independent contractors, the courts are now faced with work relationships that seem to cut both ways.

III. RAZAK V UBER TECHNOLOGIES, INC.²⁷⁹

a) Background

The case was brought by drivers representing a class of certified limousine drivers who drove for Uber's luxury UberBLACK service.²⁸⁰ The Uber drivers alleged that Uber had misclassified them as independent contractors and that as a result of the misclassification Uber had 'violated federal minimum wage and overtime requirements under the FLSA and sought to be compensated by the company in respect thereof'.²⁸¹

b) Application of the 'Donovan test'

In applying the *Donovan*²⁸² test to the relationship between Uber and the drivers, the court found that only two factors weighed in favour of an employment relationship namely, that the service rendered by the drivers, driving, did not require a special skill and that the drivers are an 'essential part of Uber's business as a transportation company'.²⁸³ Indeed, the court found that Uber would not be able to

²⁷⁸ *Ibid.*

²⁷⁹ *Razak v Uber* supra n28.

²⁸⁰ *Razak v Uber* supra n28 at 1.

²⁸¹ *Ibid.*

²⁸² *Donovan* supra n168.

²⁸³ *Razak v Uber* supra n28 at 35 and 38.

function without its drivers.²⁸⁴ This is in line with the findings of Judge Chen and Judge Chhabria in *O'Connor v Uber* and *Cotter v Lyft*, respectively.

However, as to the remaining four factors, the court found that these lent factors themselves to a finding that the drivers were independent contractors and not employees as the drivers alleged. The court's findings in relation to the first factor, the employer's right to control, contrast the findings in *O'Connor v Uber*²⁸⁵ and *Cotter v Lyft*²⁸⁶. In the California cases, both Judge Chen and Judge Chhabria found that Uber exercises extensive control over the manner and means by which drivers carry out rides once accepted.²⁸⁷ In *Razak v Uber* Judge Baylson held that there were significant indications that Uber does not exercise control over the drivers.²⁸⁸

For example, the fact that Uber drivers are able to hire subcontractors to perform services on their behalf, are permitted to work for competing ridesharing companies and are 'completely free to determine their working hours' were all indications of independent contractor status.²⁸⁹ In addition, the court understood that Uber's right to deactivate drivers for failing to comply with its standards was a mechanism intended to ensure the safety of riders.²⁹⁰

As to the extent of Uber's control over its drivers, Judge Baylson likened the situation to 'a carpenter, or a plumber' who is contracted to renovate a house –

'The homeowner may impose certain requirements while the carpenter/plumber is in the house, such as not permitting certain fumes, footwear, music, or other conditions – but all of these conditions only apply while the carpenter/plumber is in the home – and they certainly do not suffice to conclude that the carpenter/plumber is an employee.'²⁹¹

²⁸⁴ *Razak v Uber* n28 at 38.

²⁸⁵ *O'Connor v Uber* supra n27.

²⁸⁶ *Cotter v Lyft* supra n29.

²⁸⁷ See, *O'Connor v Uber* supra n27 at 24; *Cotter v Lyft* supra n29 at 14.

²⁸⁸ *Razak v Uber* supra n28 at 28.

²⁸⁹ *Razak v Uber* supra n28 at 28 – 29.

²⁹⁰ *Razak v Uber* supra n28 at 29 – 30.

²⁹¹ *Razak v Uber* supra n28 at 31.

In terms of the second *Donovan* factor, the employee's opportunity for profit and loss, the court considered that drivers are permitted to work as much or as little as they choose and/or for competitor companies if they so choose.²⁹² The fact that drivers could choose not to work or to work elsewhere if the opportunity for profit was greater as a result, were considerations that weighed in favour of independent contractor status.²⁹³

The drivers argued that the second *Donovan* factor was not satisfied as Uber determined whether drivers were allocated rides and controlled the fares in respect thereof. However, the court, quoting *Chao v Mid-Atlantic Installation Services Inc.*,²⁹⁴ held that the second *Donovan* factor did not require the drivers to be 'solely in control of their profits or losses'.²⁹⁵ The court held that drivers only made money once they elected to go online and use the Uber App, only then did the 'opportunity to earn profits begin'.²⁹⁶ On this basis the court held that the second factor favoured the conclusion that the drivers were not employees.²⁹⁷

In respect of the third *Donovan* factor, the court held that the fact that Uber drivers provided the equipment and materials required for the task, namely the car and smartphone, also pointed evidenced their status as independent contractors.²⁹⁸ In addition, with regards to the fifth *Donovan* factor, the drivers argued that they had driven for Uber for many years and for many hours per week which spoke to the permanence of the employment relationship.²⁹⁹ However, the court held that this fact 'reflected the [driver's] choices rather than Uber's necessity'.³⁰⁰ The court held that because driver's have the freedom to choose whether to drive for Uber and for

²⁹² *Razak v Uber* supra n28 at 36.

²⁹³ *Ibid.*

²⁹⁴ *Chao v Mid-Atlantic Installation Services Inc.*, 16 F. App'x 104 (4th Circ. 2001).

²⁹⁵ *Razak v Uber* supra n28 at 33.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Razak v Uber* supra n28 at 36.

³⁰⁰ *Ibid.*

how long suggested that there was ‘no permanence of the working relationship whatsoever, unless the driver wants it’.³⁰¹

Given that the majority of the *Donovan* factors weighed in favour of independent contractor status, the court found that the Uber drivers were independent contractors as a matter of law and accordingly granted Uber its motion for summary judgment. It was reported that the drivers intend to appeal the decision of the court.³⁰²

³⁰¹ *Razak v Uber* supra n28 at 36 – 37.

³⁰² Jason Laughlin ‘Uber drivers win settlement over data breach but lose case over employee rights’, *The Inquirer*, 26 September 2018, available at <http://www.philly.com/philly/business/transportation/uber-cases-settlement-pennsylvania-new-jersey-ninth-circuit-loss-california-employee-20180926.html>, accessed on 13 December 2018.

CHAPTER 5: LABOUR LAW IN SOUTH AFRICA - A ROUND HOLE OR SQUARE PEG?

Chapter Three set out the legislative framework for labour law in the US and provided an overview of the various common law tests of employment which are applied in the US on the statute and jurisdiction in question. In addition, Chapter Three examined the rationale behind the legislative and judicial interventions that were implemented during the twentieth century to countenance the harsh working conditions that workers had been subjected to during the latter half of the nineteenth century. The crucial point to be made in this regard, is that the statutory protections were put in place in the US in recognition of the fact that the employee's right to quite did not measure up to the employer's right to hire and fire. Simply put, employees, being typically less skilled than their independent contractor counterparts, lacked the flexibility and leverage to negotiate the fair terms of their employment contracts and were consequently considered to be more vulnerable to the ebbs and flows of the labour market.³⁰³ In consequence, employee status became the key to a suite of labour protections.

As the US became more industrialised employers sought to externalise certain non-core aspects of their operations in order to gain flexibility to meet changing market demands without sacrificing their bottom lines.³⁰⁴ As a result the traditional employment relationship began to erode and the question of who was and who wasn't an employee became less clear. Workers who had been shifted to the periphery were classed as independent contractors but did not seem to enjoy the same security and leverage as their so-called peer group. Accordingly, the courts developed a number of common law tests to distinguish between employees and independent contractors, properly construed.

South Africa has followed a similar pattern in the development of its labour legislation and the common law tests for employment. Legislative intervention into the South African common law contract of employment arose from the recognition

³⁰³ Pearce & Silva op cit. n34 at 12.

³⁰⁴ *Ibid.*

that it simply did not address the ‘inherent inequality of bargaining power between the employer as owner of the means of production and employees, who were entirely dependent on supply and demand for their welfare and job security’.³⁰⁵

However, an unfortunate backlash of such interventions is that the business of becoming an employer became more expensive. This has arguably led to what the International Labour Organisation has termed the problem of ‘disguised employment’.³⁰⁶ Theron asserts that the adoption of the Labour Relations Act³⁰⁷ (“**LRA**”) and the establishment of the CCMA in South Africa, coupled with increased trade union militancy during the 1980s and 1990s, ‘provided an added incentive to firms to externalize’ the non-core aspects of their operations thereby avoiding the costs associated with traditional employment.³⁰⁸ Accordingly, like the US, the South African labour market has also seen the erosion of the traditional work relationship. However, notwithstanding this erosion, labour protections in South Africa still attach to employee status. This issue is discussed further in Chapter Seven of this dissertation.

Having briefly established some of the similarities between the developments of US labour law and that of South Africa, the remainder of this Chapter provides an overview of South African labour legislation for the purpose of laying the foundation to examine the core research question of this study namely, are Uber drivers employees in terms of South African labour legislation. Part I of this Chapter examines the key labour statutes in South Africa, namely the LRA, the Basic Conditions of Employment Act³⁰⁹ (“**BCEA**”) and the Employment Equity Act³¹⁰ (“**EEA**”). Part II examines the statutory presumption of employment contained in section 200A of the LRA and section 83A of the BCEA, respectively as well as the

³⁰⁵ *Ibid.*

³⁰⁶ R198 Employment Relationship Recommendation, 2006 (No. 198).

³⁰⁷ Labour Relations Act, No. 66 of 1995.

³⁰⁸ Jan Theron ‘The Shift to Services and Triangular Employment: Implications for Labour Reform’ (2008) 29 *Indus. :L. J.* 1 at 10.

³⁰⁹ Basic Conditions of Employment Act, 75 of 1997.

³¹⁰ Employment Equity Act, 55 of 1998.

common law tests of employment. Part III provides a brief overview of the shortcomings of the current tests of employment in South Africa.

I. SOUTH AFRICAN LABOUR LEGISLATION

Grogan notes that the South African legislature has adopted three methods of addressing the inherent inequality between employees and employers namely, by the imposition of minimum conditions of employment, the promotion of collective bargaining and the development of 'special tribunals to create equitable rules for the workplace, with the power to enforce those rules'.³¹¹ The LRA, the BCEA and the EEA, amongst others, are the embodiment of this legislative strategy.

The LRA, BCEA and EEA have been promulgated in terms of the Constitution.³¹² In terms of section 39 of the Constitution, a court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law. Sections 18 (Freedom of association), 22 (Freedom of trade, occupation and profession) and 23 (Labour relations) of the Bill of Rights are of particular importance in the context of South African labour law.

The BCEA establishes basic conditions of employment relating to hours of work³¹³, overtime,³¹⁴ leave entitlements (annual, sick, maternity and family responsibility leave),³¹⁵ and the minimum notice that must be given by an employer in order to terminate an employee's contract of employment.³¹⁶

The LRA regulates collective bargaining, unfair labour practices and unfair dismissals and establishes remedies and dispute resolution procedures for the enforcement of the rights contained therein. The LRA seeks to promote collective bargaining by extending rights to employees, employers, trade unions and

³¹¹ John Grogan (2017) *Workplace Law 12th Ed.* at 3.

³¹² The Constitution of the Republic of South Africa, 1996.

³¹³ Basic Conditions of Employment Act, 75 of 1997, s9.

³¹⁴ Basic Conditions of Employment Act, 75 of 1997 at s10.

³¹⁵ Basic Conditions of Employment Act, 75 of 1997, ss 20, 22, 25, 27.

³¹⁶ Basic Condition of Employment Act, 75 of 1997, s37.

employer's organisations and establishing a framework within which these role players can achieve their objectives.³¹⁷

In terms of section 4, every employee has the right to form and/or join a trade union and to participate in the lawful activities of that trade union.³¹⁸ Section 5(1) provides a catch-all protection to employees in that it stipulates that 'no person may discriminate against an employee for exercising any right conferred by [the LRA]'. The effect of section 5, read in its entirety, is that an employer may not hire or fire an employee based on his or her trade union membership or activities.³¹⁹ However, arguably one of the most important features of the LRA in the context of collective bargaining is the fact that participation in a protected strike does not constitute a breach of contract, as it did under the common law.³²⁰ The consequence is that employees who engage in protected strike action are immune from civil liability and are protected against dismissal and other disciplinary measures.³²¹

The LRA further protects the right not to be subjected to unfair labour practices or unfairly dismissed.³²² In terms of section 186(2)(c) an 'an unfair labour practice' would include an 'unfair act or omission that arises between an employer and an *employee* involving' amongst others the 'unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an *employee*'. An employer that is found to have committed an unfair labour practice may be liable to pay a compensation award equivalent to 12 months' of the employee's remuneration.³²³

The definition of 'dismissal' in section 186(1) of the LRA includes the situation where an employer terminates employment with or without notice, amongst others. The LRA distinguishes between two categories of dismissals namely, 'automatically

³¹⁷ Labour Relations Act, No. 66 of 1995, Chapters II – VII.

³¹⁸ Labour Relations Act, No. 66 of 1995, s4(1) and 4(2).

³¹⁹ Labour Relations Act, No 66 of 1995, s5.

³²⁰ Grogan op cit. n311 at 405.

³²¹ Darcy du Toit et. al *Labour Relations Law: A Comprehensive Guide* 6th Ed. (2015) at 354 – 355.

³²² Labour Relations Act, No. 66 of 1995, s185.

³²³ Labour Relations Act, No. 66 of 1996, s194(4).

unfair dismissals'³²⁴ and 'other unfair dismissals'.³²⁵ The first carries a greater sanction for employers than the second.³²⁶ Section 187 provides that –

- (1) A dismissal is 'automatically unfair' if the employer, in dismissing the employee, acts contrary to section 4 or, if the reason for the dismissal is –
- a) that the employee participated in or supported, or indicated an intention to participate or support, a *strike* or *protest action* that complies with the provisions of Chapter IV;
 - b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an *employee* who at the time was taking part in a *strike* that complies with the provisions of Chapter IV or was locked out, unless the work was necessary to prevent an actual danger to life, personal safety or health;
 - c) a refusal by an employee to accept a demand in respect of any matter of mutual interest between them and their employer;
 - d) that the employee took action, or indicated an intention to take action, against the employer by –
 - i. exercising any right conferred by [the LRA]; or
 - ii. participating in any proceedings in term s of [the LRA];
 - e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
 - f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, general, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
 - g) a transfer, or a reason related to a transfer contemplated in section 197 or 197; or
 - h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an *employee* having made a protected disclosure defined in that Act.'

Finally, an important feature of the LRA is its establishment of special tribunals and procedures for the adjudication of labour disputes.³²⁷ The key bodies in this regard are the CCMA, Labour Courts and Labour Appeal Courts. Being established in terms of the LRA, the CCMA only has jurisdiction to hear disputes concerning employees as contemplated in section 213 of the LRA.

³²⁴ Labour Relations Act, No. 66 of 1996, s187.

³²⁵ Labour Relations Act, No. 66 of 1996, s188.

³²⁶ In terms of sections 194 of the LRA, the compensation awarded to an employee in the case of an automatically unfair dismissal is capped at the equivalent of 24 months remuneration whereas an unfair dismissal is capped at 12 months remuneration.

³²⁷ Labour Relations Act, No. 66 of 1995, Chapter VII.

The stated purpose of the EEA is to 'eliminate discrimination in the workplace and promote affirmative action.'³²⁸ The EEA is divided into two parts. The first part prohibits unfair discrimination and provides remedies to individual employees who are unfairly discriminated against. Section 6 provides that –

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

The second part of the EEA deals with affirmative action and 'elevates it to a mandatory policy' for designated employers.³²⁹

As in the US, employment status is the key to the suit of protections afforded by South African labour legislation, discussed above. Both the LRA and the BCEA expressly exclude independent contractors from their ambit and define an 'employee' to mean –

- a) any person, **excluding an independent contractor**, works for another person or for the State and who receives or is entitled to receive, any remuneration; and
- b) any other person who in any manner assist in carrying on or conducting the business of an employer.³³⁰ **[emphasis added]**

The EEA adopts a similar definition of 'employee' the wording being slightly different to that contained in the LRA and the BCEA.³³¹ The Courts have held that both subparagraphs (a) and (b) of the definition of an 'employee' exclude independent contractors.³³² It has been held that the form of assistance contemplated in subsection (b) is that rendered by an employee to an employer and

³²⁸ Grogan op cit. n311 at 7.

³²⁹ *Ibid.*

³³⁰ Labour Relations Act, No. 66 of 1995, s213; Basic Conditions of Employment Act, 75 of 1997, s1.

³³¹ Employment Equity Act, 55 of 1998, s1.

³³² *Liberty Life Association of Africa v Niselow* (1996) 17 ILJ 673 (LAC); *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ (LAC); *Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC).

‘does not extend to assistance of the kind which is rendered by independent contractors’.³³³

II. THE ‘DOMINANT IMPRESSION TEST’ AND STATUTORY PRESUMPTIONS OF EMPLOYMENT

Initially, the primary enquiry was the extent of control exercised by a putative employer over a worker (‘supervision and control test’)³³⁴ The test later developed to examine the extent to which the work performed by the worker formed an integral part of the employer’s organisation (‘organisation or integration test’).³³⁵ The test currently applied by the South African courts is the ‘dominant impression test’³³⁶ which examines the ‘nature of the relationship in its entirety and weighs up different factors’³³⁷ to determine whether the overall impression of the relationship weighs in favour of an employment relationship. This is confirmed in item 27 of the ‘Code of Good Practice: Who is an Employee’ (“**the Code of Good Practice**”),³³⁸ a guideline published by the National National Economic Development and Labour Council (“**NEDLAC**”), in terms of section 200A of the LRA.

In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others*³³⁹ (“**SITA v CCMA**”) the Labour Appeal Court held that there are three primary criteria which determine whether an employment relationship exists between a worker and a putative employer namely –

- 1) an employer’s right to supervision and control;
- 2) whether an employee forms an integral part of the organisation with the employer; and

³³³ *Liberty Life* supra n332 at 683.

³³⁴ *Colonial Mutual Life Assurance Society Ltd. v MacDonald* 1931 AD 412.

³³⁵ *R v AMCA Services Ltd. and Another* 1959 (4) SA 207 A.

³³⁶ *Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A).

³³⁷ *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A).

³³⁸ ‘Code of Good Practice: Who is an Employee’ (Government Notice 1774 of 1 December 2016 in Government Gazette No. 29445)

³³⁹ *State of Information Technology Agency (Pty) Ltd v Commission for Conciliation Mediation & Arbitration and Others* (2008) 29 ILJ 2234 (LAC) at 5.

- 3) the extent to which the employee was economically dependent on the employer³⁴⁰

In applying the three criteria, the Labour Appeal Court made reference to ‘the reality test’ in terms of which one must have regard to the substance of the relationship regardless of its form. The ‘reality test’ was previously stated by the court in *Denel (Pty) Ltd v Gerber*.³⁴¹ However, the reality test is not a ‘discrete test’³⁴² distinct from the dominant impression test. Instead, the courts have held that the reality test is ‘a measure to be applied to combat disguised employment relationships’.³⁴³ Accordingly, the dominant impression test remains the prevailing common law test for employment status in South Africa³⁴⁴, with the so-called reality test serving to guide its application.

The factors to be considered in applying the dominant impression test were established by the court in *Smit v Workmen’s Compensation Commissioner*³⁴⁵ the Appellate Division as *indicia* of the difference between employees and independent contractors. These factors have been incorporated into the Code of Good Practice³⁴⁶ in the form depicted in *Figure 1* below.

³⁴⁰ *SITA v CCMA* supra n339 at 5.

³⁴¹ *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

³⁴² *Uber SA v NUPSAW* supra n22 at 30.

³⁴³ *Ibid.*

³⁴⁴ Code of Good Practice supra n338, Item 35.

³⁴⁵ *Smit v Workmen’s Compensation Commissioner* supra n337.

³⁴⁶ Code of Good Practice supra n338, Item 32.

Figure 1

<i>Employee</i>	<i>Independent Contractor</i>
1. Object of the contract is to render personal services.	Object of contract is to perform a specified work or produce a specified result.
2. Employee must perform services personally.	Independent contractor may usually perform through others.
3. Employer may choose when to make use of services of employee.	Independent contractor must perform work (or produce result) within period fixed by contract.
4. Employee obliged to perform lawful commands and instructions of employer.	Independent contractor is subservient to the contract, not under supervision or control of employer.
5. Contract terminates on death of employee.	Contract does not necessarily terminate on death of employee.
6. Contract also terminates on expiry of period of service in contract.	Contract terminates on completion of work or production of specified result.

In keeping with ILO recommendation number 198,³⁴⁷ the legislature has created a presumption of employment which applies to a worker who earns below a certain threshold.³⁴⁸ The current threshold is R205 433.30.³⁴⁹ A person who earns below the threshold amount is deemed to be an employee of the putative employer if *i)* he or she establishes that he or she works for or renders services to the putative employer and *ii)* one or more of the seven factors are present.³⁵⁰ It is then for the employer to rebut the presumption of employment by leading evidence that the employee is an independent contractor. The factors contained in sections 200A and 83A of the LRA and BCEA, respectively, are enumerated in Part II of Chapter Six below and accordingly are not restated here.

³⁴⁷ R198 Employment Relationship Recommendation, 2006 (No. 198).

³⁴⁸ Basic Conditions of Employment Act, No. 75 of 1997, s83A; Labour Relations Act, No. 66 of 1996, s200A.

³⁴⁹ 'Determination: Earnings Threshold' (Government Notice No. 531 of 1 July 2014 in Government Gazette No. 37795)

³⁵⁰ Basic Conditions of Employment Act, No. 75 of 1997, s83A; Labour Relations Act, No. 66 of 1996, s200A.

The Code of Good Practice, referred to above, is intended to serve as guideline to decision makers in determining employment status for the purposes of labour legislation. In terms of Item 1 of the Code of Good Practice, its stated purposes are -

- a) to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation;
- b) to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee;
- c) to ensure that a proper distinction is maintained between employment relationships which are regulated by labour legislation and independent contracting;
- d) to ensure that employees - who are in an unequal bargaining position in relation to their employer - are protected through labour law and are not deprived of these protections by contracting arrangements;
- e) to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships.

The US labour system recognises a variety of common law tests which find application depending on the statute in question and the jurisdiction in which the dispute has arisen.³⁵¹ In contrast, the 'dominant impression' test is the prevailing test of employment status in South African labour law and finds application regardless of the labour statute in question or the jurisdiction in which the dispute has arisen.

However, like the US, the tests that have been developed at common law in South Africa hail from a time when employment looked very different to the way it does today. In the circumstances, it might be argued that the South African tests of employment are also 'outmoded' in the context of the on-demand economy.

³⁵¹ See Part II of Chapter Three above.

CHAPTER 6: THE STATUS OF UBER DRIVERS UNDER SOUTH AFRICAN LAW?

As it stands there has not been a definitive pronouncement on the status of Uber drivers in South Africa. The case of *Uber SA v NUPSAW*³⁵² concerned a review application brought by Uber SA, a company that ‘marketing and support services’ to Uber BV.³⁵³ Uber BV, a company incorporated in the Netherlands which owns and operates the Uber App was not a party to the proceedings in the CCMA nor the Labour Court.³⁵⁴ In the CCMA, the Commissioner ruled that the CCMA did have jurisdiction to hear the unfair dismissal disputes referred by the Uber drivers as the Uber drivers were employees in terms of section 213 of the LRA and we employees of Uber SA.

The Achilles heel of the Uber drivers’ case in the CCMA was the fact that they had not joined Uber BV as a party to the proceedings and that the Commissioner thereafter proceeded to conflate the distinction between Uber BV and Uber SA in her *in limine* ruling. As Judge Andre van Niekerk notes in the Labour Court decision, ‘each of the building blocks of the drivers’ case pertains to Uber BV and not Uber SA’.³⁵⁵ In the circumstances, the Labour Court could not consider whether the Uber drivers were employees of Uber BV nor could it consider whether the Uber drivers’ deactivation from the Uber App amounted to an unfair dismissal in terms of the LRA.

In the absence of a definitive pronouncement on the status of Uber drivers in South Africa, this Chapter seeks to determine whether Uber drivers can be classified as employees in terms of South African law. In order to do so, the analysis draws on the reasoning in the judgments of *O’Connor v Lyft*³⁵⁶ and *Razak v Uber*.³⁵⁷ Although the case of *Cotter v Lyft*³⁵⁸ does not involve Uber drivers, but

³⁵² *Uber SA v NUPSAW* supra n22.

³⁵³ *Uber SA v NUPSAW* supra n22 at 11.

³⁵⁴ *Uber SA v NUPSAW* supra n22 at 1.

³⁵⁵ *Uber SA v NUPSAW* supra n22 at 37.

³⁵⁶ *O’Connor v Uber* supra n27.

³⁵⁷ *Razak v Uber* supra n28.

³⁵⁸ *Cotter v Lyft* supra n29.

rather Lyft drivers the reasoning of Judge Chhabria is useful because both Uber and Lyft operate in a similar manner. In addition, the companies and drivers are seen to have advanced similar arguments in their motions for summary judgment.

In addition, the analysis will rely on the judgment of *Uber SA v NUPSAW*³⁵⁹ and the findings of the Commissioner contained therein. Despite the fact that the Commissioner conflated the distinction between Uber SA and Uber BV, her reasoning is nevertheless valuable because it is clear that the entity that she conceived of is the entity that owns and operates the Uber App and communicates with Uber drivers in relation thereto. Although the reasoning was incorrect in law, because the incorrect party had been cited, it is conceivable that given Uber's global reach its company structure would not be common knowledge.

Part I examines the case of *Uber SA v NUPSAW*.³⁶⁰ Part II contains the analysis of whether Uber drivers are employees in terms of South African law. The abovementioned cases as well as Mokoena's³⁶¹ academic findings are relied upon in Part II of this Chapter to construct an idea of what a South African decision maker might find in respect of the classification of Uber drivers. An analysis of the factors contained in the statutory presumptions of employment³⁶² against the findings in the US courts reveals that many of the factors can be interpreted to go either way. In other words, some factors cut in favour of employee status whilst others cut in favour of independent contractor status. Part III examines the challenges faced by South African labour law in classifying workers in the on-demand economy, such as Uber drivers. It will be argued in Part III that while South Africa does not share the problem of a multiplicity of conflicting tests that the US has, its common law test is somewhat outdated in the context of the 'uberfied' work relationship.

³⁵⁹ *Uber SA v NUPSAW* supra n22.

³⁶⁰ *Ibid.*

³⁶¹ Kgomoetso Mokoena 'Are Uber drivers employees? A look at emerging business models and whether they can be accommodated by South African Labour Law' (2016) 37 ILJ 1574.

³⁶² Labour Relations Act, No. 66 of 1995, s200A; Basic Conditions of Employment Act, No. 75 of 1997, s83A

I. UBER SA v NUPSAW

The Uber drivers had referred an unfair dismissal dispute to the CCMA alleging that their deactivation from the Uber App constituted an unfair dismissal in terms of the LRA.³⁶³ The CCMA, being established in terms of the LRA, only has jurisdiction to adjudicate unfair dismissal disputes if the complainant is an 'employee' as defined in section 213 of the LRA.

In the CCMA proceedings, Uber SA objected to the CCMA's jurisdiction to hear the matter on the basis that the Uber drivers were not employees of Uber SA.³⁶⁴ Uber SA denied that there was any contractual relationship between Uber SA and the drivers.³⁶⁵ It argued that any relevant contractual relationship existed between the Uber drivers and Uber BV which was not a party to the proceedings.³⁶⁶ Uber SA further argued that in any event, Uber drivers were not employees of Uber BV but rather independent contractors.³⁶⁷ The Commissioner dismissed Uber SA's jurisdictional challenge and issued a ruling that it did have jurisdiction to adjudicate the Uber driver's unfair dismissal disputes on the basis that the Uber drivers were employees as contemplated in section 213 of the LRA and were employed by Uber SA.³⁶⁸

The Commissioner applied what she referred to as the 'reality of the relationship test' being what she considered to be a 'new comprehensive test' introduced by the Code of Good Practice and held that –

- the drivers **render personal services** to Uber SA in that they are required to be on-boarded personally, drive in their own name and may not out-source the driving to a third party;³⁶⁹

³⁶³ *Uber SA v NUPSAW* supra n22 at 4.

³⁶⁴ *Uber SA v NUPSAW* supra n22 at 9.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ *Uber SA v NUPSAW* supra n22.

- the **work relationship is indefinite** as long as the driver complies with the requirements;³⁷⁰
- the **drivers are subject to the control of Uber SA** in that Uber SA controls the manner in which they work by setting clear standards and performance requirements (in particular Uber SA's deactivation policy). In addition, Uber SA exercises control through technology (rider ratings);³⁷¹
- the drivers cannot **source riders independently** nor **independently determine the fare** that is to be charged in respect thereof;³⁷²
- the drivers were **economically dependent** on Uber SA;³⁷³ and
- the drivers were an **essential part** of Uber SA's service.³⁷⁴

On review, the Labour Court found that although the test applied by the Commissioner was unclear it bore a close resemblance to the 'dominant impression' test.³⁷⁵ In this regard, Judge van Niekerk was careful to state that the Code of Good Practice does not constitute a self-standing test in South African law and the dominant impression test remains intact.³⁷⁶

Importantly, the Labour Court held that the Commissioner had conflated the distinction between Uber SA and Uber BV, a company incorporated in the Netherlands.³⁷⁷ The Labour Court examined the distinction between Uber BV and Uber SA and found that Uber BV, as the owner and operator of the Uber App, was

³⁷⁰ *Uber SA v NUPSAW* supra n22 at 22.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Uber SA v NUPSAW* supra n22 at 23.

³⁷⁴ *Ibid.*

³⁷⁵ *Uber SA v NUPSAW* supra n22 at 29.

³⁷⁶ *Uber SA v NUPSAW* supra n22 at 30.

³⁷⁷ *Uber SA v NUPSAW* supra n22 at 37.

the contracting party in all of the agreements concluded by the Uber drivers.³⁷⁸ In addition, Uber BV controlled the 'on-boarding', deactivation and payment procedures.³⁷⁹ Uber SA is a South African entity that provides 'marketing and support services' to Uber BV.³⁸⁰ Accordingly, no contractual relationship exists between Uber drivers and Uber SA.³⁸¹ Indeed, the Labour Court held that 'each of the building blocks of the drivers' case pertains to Uber BV and not Uber SA'.³⁸²

The Labour Court ultimately set aside the Commissioner's *in limine* ruling and substituted it with its own.³⁸³ The effect of the court's substitution order was that Uber SA's objection to the jurisdiction of the CCMA was upheld and the Uber driver's referrals were dismissed.³⁸⁴ In the circumstances, the question of whether Uber drivers are employees of Uber BV under South African law remains to be determined, as Judge van Niekerk notes –

'whether the drivers are employees of Uber BV (either alone or in a co-employment relationship with another or other parties), or whether they are independent contractors of Uber BV, is a matter that remains for decision on another day.'³⁸⁵

II. ARE UBER DRIVERS EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER SOUTH AFRICAN LAW?

a) The Presumption of Employment – s200A of the LRA and s83A of the BCEA

A worker must satisfy three requirements in order for the statutory presumption contained in sections 200A and 83A of the LRA and BCEA respectively, to apply. The worker must establish that –

³⁷⁸ *Uber SA v NUPSAW* supra n22 at 11.

³⁷⁹ *Uber SA v NUPSAW* supra n22 at 11 – 12.

³⁸⁰ *Uber SA v NUPSAW* supra n22 at 11.

³⁸¹ *Ibid.*

³⁸² *Uber SA v NUPSAW* supra n22 at 37.

³⁸³ *Uber SA v NUPSAW* supra n22 at 40.

³⁸⁴ *Uber SA v NUPSAW* supra n22 at 40.

³⁸⁵ *Uber SA v NUPSAW* supra n22 at 37.

- he or she earns below the threshold amount;
- he or she renders services to another person; and
- that one of the seven factors are present.³⁸⁶

The South African statutory presumptions of employment are similar to the presumption of employment created by the *Borello* test under California law albeit with some added features. In terms of the *Borello* test a worker is presumed to be an employee once he or she establishes that he or she renders services to another person.³⁸⁷

In the absence of empirical evidence regarding the average earnings of Uber drivers in South Africa it is not possible to say whether Uber drivers generally earn below or above the threshold amount. Uber drivers are entitled to work as much or as little as they choose.³⁸⁸ Accordingly, it may be that some Uber drivers earn below the threshold amount whereas others may earn above the threshold amount. Ultimately this will have to be determined on a case by case basis. This Chapter proceeds on the assumption that some Uber drivers may earn below the threshold amount and examines whether they would be able to establish that they are presumptive employees under South African law.

An Uber partner-driver who meets the threshold requirements will first have to establish that he or she renders a service to Uber. In *O'Connor v Uber* the court found that the Uber drivers did render a service to Uber and were accordingly presumptive employees under California law.³⁸⁹ Central to the Judge Chen's finding in this regard was the rejection of Uber's argument that it was not a transportation company but rather a 'pure "technology company" that merely generated "leads" for its transportation providers through its software'.³⁹⁰

³⁸⁶ See Part II of Chapter Three above; Labour Relations Act, No. 66 of 1995, s200A; The Basic Conditions of Employment Act, No. 75 of 1997, s83A.

³⁸⁷ *O'Connor v Uber* supra n27 at 6.

³⁸⁸ *O'Connor v Uber* supra n27 at 2; *Razak v Uber* supra n28 at 12.

³⁸⁹ *O'Connor v Uber* supra n27 at 15.

³⁹⁰ *O'Connor v Uber* supra n27 at 5.

Lyft, a company that markets itself and functions similarly to Uber in the US, advanced a similar strain of this argument in *Cotter v Lyft* by arguing that the drivers did not perform a service for Lyft but rather to Lyft's riders.³⁹¹ Lyft argued that it merely furnished drivers with the platform to connect with riders.³⁹² However, the court found that this argument was 'not a serious one' as Lyft concerns itself with more than simply connecting drivers with riders.³⁹³ Instead, Lyft is seen to actively market itself to riders as an 'on-demand ride service' and seeks out those customers.³⁹⁴

It is likely that Uber would advance a similar argument before a South African decision-maker. In *Uber SA v NUPSAW* the Labour Court records that in the CCMA proceedings Uber SA argued that riders contract with drivers independently, which argument was ultimately rejected by the Commissioner.³⁹⁵ In the light of the foregoing, it could be argued that a South African decision-maker might find that Uber drivers render services to Uber BV, thus satisfying the second leg of the statutory presumptions of employment.

The final leg of the enquiry turns on whether a worker can establish that one of the seven factors listed in section 200A(1) of the LRA, and mirrored in section 83A(1) of the BCEA, are present. These factors are applied to the Uber / driver relationship and are discussed in turn below.

- **The manner in which the person works is subject to the control or direction of another person**³⁹⁶

The extent to which Uber drivers are subject to the control or direction of Uber in the performance of their transportation services has been the subject of contention in the US. The key aspects of the Uber work relationship that have been relied

³⁹¹ *Cotter v Lyft* supra n29 at 14.

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Uber SA v NUPSAW* op cit. n22 at 24.

³⁹⁶ Labour Relations Act, 66 of 1995, s200A(1)(a).

upon by drivers to asset that Uber exercises a significant amount of control over the manner in which Uber drivers perform their work are the ‘suggestions’ provided by Uber as to the manner in which rides are to be completed³⁹⁷ and the fact that Uber may suspend or deactivate drivers if their performance ratings fall below a certain threshold.³⁹⁸

In *O’Connor v Uber* Judge Chen found that the ‘suggestions’ provided by Uber were written in the language of command and carried with them the sanction of suspension or deactivation if a driver’s failure to comply with them resulted in low performance ratings.³⁹⁹ In addition, the fact that the rider ratings and feedback function essentially rendered Uber drivers observable at all times could be an indicator that Uber exerts a tremendous amount of control over the manner and means that drivers carry out rides.⁴⁰⁰ The court held although this question was ‘hotly disputed’ between the parties, there was evidence to suggest that Uber did exercise significant control over the manner and means that drivers were required to carry out rides.⁴⁰¹

The Commissioner likewise found that Uber drivers are subject to the control of Uber in that Uber sets ‘clear standards and performance requirements’.⁴⁰² In addition, the Commissioner found that the drivers were controlled through technology, being a reference to the Uber App.⁴⁰³

In *Razak v Uber*⁴⁰⁴ Judge Baylson took a different view. While the court in *O’Connor v Uber*⁴⁰⁵ found that the extent of Uber’s control remained in dispute between the parties, Judge Baylson held that there were ‘significant indications...

³⁹⁷ *O’Connor v Uber* supra n27 at 21 – 22; *Razak v Uber* supra n28 at 23.

³⁹⁸ *O’Connor v Uber* supra n27 at 22 – 23; *Razak v Uber* supra n28 at 23.

³⁹⁹ *O’Connor v Uber* supra n27 at 21.

⁴⁰⁰ *O’Connor v Uber* supra n27 at 24.

⁴⁰¹ *O’Connor v Uber* n27 at 21.

⁴⁰² *Uber SA v NUPSAW* supra n22 at 22.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Razak v Uber* supra n28.

⁴⁰⁵ *O’Connor v Uber* n27 at 21.

that Uber does not exercise substantial control over its drivers.⁴⁰⁶ The fact that Uber drivers are permitted to hire subcontractors, work for competing companies and are ‘completely free to determine their working hours’ were some of the aspects of the work relationship that the Judge found to weigh in favour of independent contractor status.⁴⁰⁷ In addition, Judge Baylson interpreted the ‘suggestions’ provided by Uber as to the manner in which rides are to be carried out as a mechanism to ensure the safety of its riders and not an indication of its control over the drivers.⁴⁰⁸

The Labour Appeal Court has confirmed in *Parliament of the RSA v Charlton*⁴⁰⁹ that there can be instances where an employment relationship exists notwithstanding the fact that there is a relatively low degree of control. In addition, Item 18(a) of the Code of Good Practice provides that –

‘The factor of control or direction will generally be present if the applicant is required to **obey the lawful and reasonable commands, orders or instructions of the employer** or the employer’s personnel (for example, managers or supervisors) as to the manner in which they are to work... It is an indication of an employment relationship that the “employer” retains the **right to choose which tools, staff, raw materials, routines, patents or technology are used**. Likewise, the fact that an employer is entitled to take **disciplinary action** against the person as a result of the manner in which the person works is a strong indication of an employment relationship.’⁴¹⁰

It may be that a South African decision maker takes the view adopted in *O’Connor v Uber* that Uber drivers are obliged to follow the ‘suggestions’ provided by Uber given that they are written in the language of command and carry the sanction of deactivation from the Uber App if not followed.⁴¹¹ On this view, a South African decision maker might find that the manner in which Uber drivers work is subject to the control and direction of Uber.⁴¹² However, it is also possible that such a decision-maker might follow the approach in *Razak v Uber*.⁴¹³ It could be argued

⁴⁰⁶ *Razak v Uber* supra n28 at 28.

⁴⁰⁷ *Razak v Uber* supra n28 at 28 – 29.

⁴⁰⁸ *Razak v Uber* supra n28 at 29 – 30.

⁴⁰⁹ *Parliament of the RSA v Charlton* (2010) 31 ILJ 2353 (LAC).

⁴¹⁰ Code of Good Practice supra n338, Item 18(a).

⁴¹¹ *O’Connor v Uber* supra n27 at 21.

⁴¹² *O’Connor v Uber* supra n27 at 21.

⁴¹³ *Razak v Uber* supra n28 at 28 – 29.

that this factor could go either way, depending on the way in which a decision maker interprets this aspect of the Uber / driver relationship.

In *O'Connor v Uber* the court was not required to determine whether Uber's right to suspend or deactivate Uber drivers constituted disciplinary. Similarly, the Labour Court in *Uber SA v NUPSAW* was also not required to determine this question.⁴¹⁴ Should a South African decision maker find that deactivation or suspension from the Uber App constitutes disciplinary action, it would be a strong indication of an employment relationship, as indicated in the Code of Good Practice.⁴¹⁵

Notwithstanding the fact that Uber drivers provide their own vehicles, drivers will not be activated on the Uber App until their vehicle has been approved during the on-boarding process.⁴¹⁶ Uber provides the Uber App, the critical tool for the Uber drivers to perform their service. It could also be argued that Uber, in controlling the amount of drivers that are permitted in a particular zone, such as the airport,⁴¹⁷ effectively controls its driver's routines.

In the light of the foregoing, it is unclear whether an Uber driver would be able to establish that the manner in which he or she works subject to the direction and control of Uber. It could be argued that many of the building blocks of this factor are open to interpretation by the relevant decision-maker.

- **The person's hours of work are subject to the control or direction of another person**⁴¹⁸

Item 18(b) of the Code of Good Practice states that –

'Sufficient control or direction may be present if the contract between the parties determines the total number of hours that the person is required to work within a specified period. Flexible working time arrangements are not incompatible with an employment relationship'⁴¹⁹

⁴¹⁴ *Uber SA v NUPSAW* supra n22 at 4.

⁴¹⁵ Code of Good Practice supra n338, Item 18(a).

⁴¹⁶ *Uber SA v NUPSAW* supra n22 at 17.

⁴¹⁷ *Uber SA v NUPSAW* supra n22 at 14.

⁴¹⁸ Labour Relations Act, No. 66 of 1995, s200A(b).

⁴¹⁹ Code of Good Practice supra n338, Item 18(b).

The service agreements concluded between Uber and its drivers provide that Uber has the right 'at all times and at Uber's sole discretion, to reclaim prohibit, suspend, limit or otherwise restrict the Transportation Company [partner] and/or the Driver from accessing or using the [Uber App].'⁴²⁰ One of the hallmarks of the Uber / driver relationship is that Uber drivers are permitted to work as much or as little as they choose.⁴²¹ But, practically there are consequences for Uber drivers who decline rides too often or remain inactive on the Uber App for too long namely the possibility of being 'deactivated' or 'archived'.⁴²²

A South African decision-maker might interpret Uber's right to deactivate or suspend drivers, coupled with its deactivation policies, as a clause that effectively determines the total number of hours that Uber drivers are required to work within a specified period. The extent to which a driver will be able to establish this factor would depend on whether or not a South African decision-maker accepts this or a similar interpretation of Uber's right to deactivate or suspend drivers.

- **In the case of a person who works for an organisation, the person is a part of that organisation;**⁴²³

In *O'Connor v Uber* one of the reasons advanced for the court's finding that the Uber drivers were presumptive employees under California law was the fact that the drivers formed an integral part of Uber's business indeed 'Uber simply would not be a viable business entity without its drivers'.⁴²⁴

However, if one accepts Uber's argument that the drivers are in business for themselves and that Uber merely licenses the Uber App to them then the picture changes slightly in light of item 18(c) of the Code of Good. Item 18(c) provides that a person who supplies services to another person 'as part of conducting their own

⁴²⁰ *O'Connor v Uber* supra n27 at 20.

⁴²¹ *O'Connor v Uber* supra n27 at 21; *Razak v Uber* supra n28 at 31.

⁴²² *Uber SA v NUPSAW* supra n22 at 15; *O'Connor v Uber* supra n27 at 21.

⁴²³ Labour Relations Act, No. 66 of 1995, s200A(c).

⁴²⁴ *O'Connor v Uber* supra n27 at 11.

business does not form part of the employer's organisation'.⁴²⁵ It further provides that some of the factors which indicate that a worker operates his or her own business are that they bear the risks ordinarily borne by an employer namely, 'bad workmanship, poor performance, price hikes and time over-runs'.⁴²⁶

Expanding on this, if it is accepted that Uber drivers are in business for themselves then the services that they provide, transportation services, form part of conducting their own business. In addition, an Uber driver who performs badly in carrying out rides bears the brunt of poor customer ratings (being deactivation or suspension from the Uber App). Likewise, if Uber increases its rates the driver suffers the consequences.

It could be argued that if a South African decision-maker accepts the position that Uber drivers are in business for themselves, as the court in *Razak v Uber*⁴²⁷ essentially did, then the existence of this factor would not be established. Accordingly, it could be argued that this factor can arguably go either way.

- **The person has worked for that other person for an average of at least 40 hours per month over the last three months;**⁴²⁸

It is the hallmark of the Uber / driver relationship that drivers are permitted to drive as much or as little as they like, notwithstanding the consequences discussed above.⁴²⁹ In the circumstances, the extent to which an Uber driver can establish this factor will depend on the circumstances of each case.

- **The person is economically dependent on the other person for whom that person works or renders services;**⁴³⁰

⁴²⁵ Code of Good Practice supra n338, Item 18(c).

⁴²⁶ *Ibid.*

⁴²⁷ *Razak v Uber* supra n28.

⁴²⁸ Labour Relations Act, No. 66 of 1995, s200A(d).

⁴²⁹ *O'Connor v Uber* supra n27 at 21; *Razak v Uber* supra n28 at 31.

⁴³⁰ Labour Relations Act, No. 66 of 1995, s200A(e).

Benjamin asserts that economic dependence relates to the 'entrepreneurial position of the person in the marketplace'.⁴³¹ A genuinely self-employed person is not economically dependent on another person where he or she retains the right to work for others.⁴³² Accordingly, the fact that a person is contractually bound to supply services to one person is a strong indicator that he or she is an employee. In addition, a person's dependence on another person for the supply of work is also a strong indication of an employment relationship.⁴³³ These principles are echoed in item 18(e) of the Code of Good Practice.⁴³⁴

In addition to being able to work as much or as little as they like, it is a material term of the service agreements concluded between Uber and its drivers that the drivers are permitted to work for other individuals or entities.⁴³⁵ This is a strong indication of independent contractor status. It may be that certain Uber drivers elect to work for Uber alone, but it could be argued that this ultimately remains the driver's choice as they are not prohibited from doing so. Accordingly, a South African decision-maker might find that this factor is not present in the relationship between Uber and its drivers.

- **the person is provided with tools of trade or work equipment by the other person;**⁴³⁶

Uber drivers (at least partner-drivers) are required to provide their own vehicles in order to join the Uber App. Accordingly, a South African decision maker might find that this factor is not present in the relationship between Uber and its drivers. However, a South African decision-maker might also find that the Uber App, provided by Uber, is a critical tool of trade or work sufficient to establish the existence of this principle. This, like many other factors can arguably go either way

⁴³¹ Benjamin op cit. n45 at 803.

⁴³² *Ibid.*

⁴³³ *Ibid.*

⁴³⁴ Code of Good Practice supra n338, Item 18(e).

⁴³⁵ *Razak v Uber* supra n28 at 28.

⁴³⁶ Labour Relations Act, No. 66 of 1995, s200A(f).

depending on the way in which the decision-maker conceives of the nature and importance of the Uber App.

- **the person only works for or renders services to one person.**⁴³⁷

Item 18(g) of the Code of Good Practice provides that ‘it is not relevant that work is permitted in terms of the relationship or whether it involves “moonlighting” contrary to the terms of the relationship.’⁴³⁸ Accordingly, an Uber driver may be able to establish this principle, notwithstanding that he or she is permitted to work for others, if as a matter of fact he or she only renders services to Uber.

In conclusion, having assessed the abovementioned factors, it is likely that an Uber driver that earns below the threshold amount would be able to establish the existence of at least one of the factors analysed above and would be classified as a presumptive employee in terms of sections 200A of the LRA in consequence. However, it is also clear from the above analysis that the ‘uberfied’ work relationship does not neatly fit the factors enumerated above.

b) Application of the ‘dominant impression’ test

In respect of those Uber drivers who earn above the threshold, a South African decision-maker would be required to apply the dominant impression test established in *Smit v Workmen’s Compensation Commissioner*.⁴³⁹ Mokoena finds that Uber drivers render personal services to Uber which services must be performed personally and at the behest of Uber.⁴⁴⁰ In addition, Uber drivers are obliged to obey the commands and instructions of Uber by virtue of the fact that their failure to do so carries the sanction of deactivation or suspension from the Uber App.⁴⁴¹

⁴³⁷ Labour Relations Act, No. 66 of 1995, s200A(g).

⁴³⁸ Code of Good Practice supra n338, Item 18(g).

⁴³⁹ *Smit v Workmen’s Compensation Commissioner* supra n337; Code of Good Practice supra n338, Item 27.

⁴⁴⁰ Mokoena op cit. n361 at 1581.

⁴⁴¹ *Ibid.*

Finally the contract between Uber and its drivers terminates upon the death of the employee.⁴⁴²

Of the three factors enumerated in *SITA v CCMA*⁴⁴³ the extent to which Uber has the right to supervise and control its drivers in the performance of their transportation services is the subject of debate. This has been discussed above however the crucial point to be made is that the answer does not appear to be clear cut. In addition, the extent to which Uber drivers are economically dependent on Uber may also go either way depending on the facts of each case. It has however been widely accepted in the US courts that Uber drivers do form an integral part of Uber's business.⁴⁴⁴

III. THE SOUTH AFRICAN CHALLENGE

The fact that many of the factors, examined in this Part, can be interpreted to fit either construction of Uber drivers (ie that Uber drivers are employees or independent contractors) suggests that perhaps the South African common law tests are also outmoded in the context of the on-demand economy, as it has been argued in the case of the US common law tests.⁴⁴⁵ Many of the aspects of the 'uberfied' work relationship do not seem to accord with the factors enumerated in section 200A(1) of the LRA or the common law tests.

However, it can be argued that this problem is not new to South African labour law. Writing in 2004, Benjamin asserts that the dominant impression test has been criticised since its formulation in 1979. In 1980, Mureinik argued that the dominant impression test 'fails to say anything about the legal nature of the contract of employment and gives no assistance in difficult cases on the border... between employment and self-employment.'⁴⁴⁶ Brassey has argued that the dominant

⁴⁴² *Ibid.*

⁴⁴³ *SITA v CCMA* supra n339.

⁴⁴⁴ *O'Connor v Uber* supra n27 at 26; *Razak v Uber* supra n28 at 38.

⁴⁴⁵ *O'Connor v Uber* supra n27 at 27; *Cotter v Lyft* supra n29 at 19.

⁴⁴⁶ Benjamin op cit. n45 at 792; See E, Mureinik 'The Contract of Service: An Easy Test for Hard Cases' (1980) 97 SALJ 246 at 258.

impression test simply establishes that a decision must be taken in light of the relevant factors.⁴⁴⁷ These sentiments were repeated in the case of *Medical Association of SA & Others v Minister of Health & Another*⁴⁴⁸ wherein Zondo AJ held that the test was 'unsatisfactory because of the uncertainty it creates'.⁴⁴⁹

It will be argued in Chapter Seven below that in essence the 'gig' workers and the workers of the twentieth century who occupied the 'grey area between employment and self-employment'.⁴⁵⁰ For all intents and purposes Uber drivers, and their contemporaries who perform 'work on-demand via apps',⁴⁵¹ occupy an awkward space between employees and independent contractors, being not quite one construction but not quite the other either.⁴⁵²

In addressing the core research question of this study, it is argued that Uber drivers are not quite employees in terms of section 213 of the LRA but are not quite independent contractors either. It has been said that an Uber driver who earns below the threshold amount is likely to establish the existence of at least one of the factors enumerated in section 200A LRA. However, the fact that many of the other aspects of the work relationship seem to point in the direction of independent contractor status suggests that Uber might successfully rebut this presumption. As to those Uber drivers who do not earn below the threshold amount, the factors do not lend themselves to a certain outcome. Accordingly, it is argued that the South African tests of employment do not adequately cover the 'uberfied' work relationship and due to this uncertainty Uber drivers are not adequately protected by South African labour laws.

⁴⁴⁷ Brassey 'The Nature of Employment' (1990) 11 ILJ 889 at 919.

⁴⁴⁸ *Medical Association of SA & Others v Minister of Health & Another* (1997) 18 ILJ 528 (LC).

⁴⁴⁹ Benjamin op cit. n45 at 793.

⁴⁵⁰ Benjamin op cit. n45 at 789.

⁴⁵¹ De Stefano op cit. n3 at 1.

⁴⁵² *Cotter v Lyft* supra n29 at 1.

CHAPTER 7: CONCLUSIONS AND SUGGESTIONS - CLASSIFYING UBER DRIVERS IN SOUTH AFRICA - AN ÜBERIFICATION OF THE STATUS QUO?

At the outset of this dissertation it was remarked that ‘employment is not what it used to be’, a statement from Theron writing in 2003.⁴⁵³ There can be no doubt that companies like Uber, Lyft, TaskRabbit and others have significantly changed the manner in which workers earn income through the use of mobile and web applications. Even those workers located in the ‘grey area between employment and self-employment’⁴⁵⁴ would have at some time or another come face to face with their employer and may have even rendered services in the hirer’s workplace alongside traditional employees.

Today, the picture is quite different for many workers who provide services either via ‘crowd work’⁴⁵⁵ or ‘work on-demand via apps.’⁴⁵⁶ In the absence of any central dispatch units, it is likely that Uber drivers may never come into contact with Uber personnel other than through the Uber App and the emails generated by Uber during the subsistence of the work relationship. In addition, Uber drivers may never come into contact with one another (although human experience tells us that it is likely that they would probably come into contact whilst queuing in high demand areas). Accordingly, the image of workers in the on-demand economy as an ‘invisible’,⁴⁵⁷ ‘just-in-time’⁴⁵⁸ workforce is fairly easy to conjure.

However, as de Stefano notes, the on-demand economy should not be seen as a ‘parallel universe’ to the existing labour market.⁴⁵⁹ Whilst it is true that companies like Uber have changed the nature of work de Stefano asserts that crowd work and work on-demand via apps forms part of ‘a much vaster trend

⁴⁵³ Theron op cit. n1 at 1247.

⁴⁵⁴ Benjamin op cit. n45 at 789.

⁴⁵⁵ De Stefano op cit. n3 at 1.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ De Stefano op cit. n3 at 21.

⁴⁵⁸ De Stefano op cit. n3 at 1.

⁴⁵⁹ De Stefano op cit. n3 at 6.

towards the casualisation of labour'.⁴⁶⁰ According to de Stefano, 'gig' work 'shares several relevant dimensions with non-standard forms of employment'.⁴⁶¹ For example, like their casualised counterparts the work performed by 'gig' workers is often typified by 'unpredictable working hours and unreliable source of income'.⁴⁶² In addition, the 'intermittent nature of their activity' means that 'gig' workers, even if they were to be classified as employees, would be excluded from certain employment rights relating to maternity leave, paid leave and full employment benefits, amongst others, because those rights are dependent upon length of service.⁴⁶³

Non-standard workers, outside of the on-demand economy, are seen to experience the problem of a multiplicity of contracting parties which results in the situation where a person may not know who they are actually rendering services to.⁴⁶⁴ The case of *Uber SA v NUPSAW*⁴⁶⁵ is arguable case in point in this regard. It has been said that the Achilles heel for the drivers in that case was the fact that Uber BV was not cited in the CCMA proceedings.⁴⁶⁶ But it is conceivable that given the global reach of 'Uber', in reference to the brand, drivers would not know the precise entity with whom they were rendering services to. On one hand, all of the drivers contracts were concluded with Uber BV and all of the 'suggestions' came from that entity, however on the ground and in the minds of the Uber drivers their primary interaction was with Uber SA, a local entity.

Much of the focus around the Uber worker classification debate has centred the binary question of whether Uber drivers are employees or independent contractors. If one is to accept the position that Uber drivers are employees, notwithstanding the fact that they are classified as independent contractors by Uber,

⁴⁶⁰ *Ibid.*

⁴⁶¹ De Stefano op cit. n3 at 7.

⁴⁶² *Ibid.*

⁴⁶³ De Stefano op cit. n3 at 8.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Uber SA v NUPSAW* supra 22.

⁴⁶⁶ See, Chapter Six above.

then one accepts that the Uber / driver relationship is one of disguised employment. In terms of ILO Recommendation 198, disguised employment occurs when –

‘the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due...’⁴⁶⁷

The definition of disguised employment seems to suggest that if a decision-maker were to look beyond the title given to a work relationship it would be clear that in fact an employment relationship exists. It has been argued in Chapter Six above that an analysis of the Uber / driver relationship in terms of the current tests of employment under South African, and US, labour law, does not lend itself to a clear answer. In some aspects, Uber drivers appear to be employees whilst in others they appear to be independent contractors.⁴⁶⁸ As Judge Chhabria notes in *Cotter v Lyft* the task of classifying drivers in the on-demand economy is akin to being ‘handed a square peg and asked to choose between two round holes’.⁴⁶⁹

In the circumstances, it can be argued that it is the binary upon which most labour systems are built that creates the dilemma that now faces workers in the on-demand economy, who are arguably a vulnerable class of workers. The ILO has already recognised the concept of ‘dependent self-employment’ in terms of which the worker performance services for a business under a contract, other than an employment contract, but depends on a pool of clients for his or her income and ‘may receive direction regarding how the work is to be done’.⁴⁷⁰ Some jurisdictions have also begun to recognise this intermediate category of workers that seem to occupy the space between employment and self-employment.

⁴⁶⁷ R198 Employment Relationship Recommendation, 2006 (No. 198).

⁴⁶⁸ See, Chapter Five and Parts II and III of Chapter Six above.

⁴⁶⁹ *Cotter v Lyft* supra n29 at 19.

⁴⁷⁰ ‘Disguised employment / Dependent self-employment’ *ILO Website* available at https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/index.htm accessed on 9 February 2019.

In Canada, a 'dependent contractor' is defined as a person who –

'whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions as they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.'⁴⁷¹

Canada's approach to extending rights to 'dependent contractors' has been to generally maintain the binary between independent contractors and employees and to 'either extend or reduce coverage' to workers with this status through other legislation and regulation.⁴⁷² Accordingly, 'dependent contractors' in Canada are seen to enjoy collective bargaining rights and minimum standards of work but the coverage in areas such as employment equity, occupational health and safety and income taxes amongst others is less clear.⁴⁷³ Accordingly Pearce and Silva note that the approach that has been adopted in Canada does not offer a 'universal solution'.⁴⁷⁴

It is beyond the scope of this study to consider the various solutions to the problem of worker classification in the on-demand economy that have been examined by various academics. The 'dependent contractor' model employed by Canada is but one solution that may extend necessary labour protections 'gig' workers in the on-demand economy. It may be that such a model is suited to the South African labour market. Ultimately it will be for the legislature and the judiciary to determine.

⁴⁷¹ Canadian Labour Code, RSC, 1985, c L – 2, s3.

⁴⁷² Pearce & Silva op cit. n34 at 33.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

CHAPTER 8: CONCLUSION

The core research question posed by this study asked whether Uber drivers could be classified as employees under South African law.⁴⁷⁵ The objective of the study is to determine whether existing labour laws in South Africa offer adequate protection to workers, like Uber drivers, in the on-demand economy. It has been argued that Uber drivers do not neatly fall within the definition of employee in section 213 of the LRA.⁴⁷⁶ However, Uber drivers do not neatly fit the category of independent contractor either.⁴⁷⁷ The fact that the aspects of the 'uberfied' work relationship do not seem to speak to the factors enumerated in the South African tests of employment suggests that perhaps these factors are outdated in the context of the on-demand economy. This is a challenge that South Africa shares with the US. As a consequence of this uncertainty, Uber drivers are not afforded adequate protection under existing South African labour laws.

But, this is not a new problem. As Benjamin notes the dominant impression test has long since been criticised for failing to adequately deal with workers located in the 'grey area between employment and self-employment'.⁴⁷⁸ It has been argued in Chapter Seven, that the on-demand economy should not be viewed as a 'parallel universe' to the existing labour market.⁴⁷⁹ Instead, the problems faced by 'gig' workers, like Uber drivers, form part of 'a much vaster trend towards the casualisation of labour'.⁴⁸⁰ In this sense, it can be said that the type of work relationship created by companies like Uber, is simply an 'uberfication' of the status quo. In other words, companies like Uber have done no more than give the non-standard employee a smart phone application with which to earn an income.

⁴⁷⁵ See, Chapter One.

⁴⁷⁶ See, Part II of Chapter Six.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ Benjamin op cit. n45 at 789.

⁴⁷⁹ De Stefano op cit. n3 at 6.

⁴⁸⁰ *Ibid.*

This is not to understate the extent to which Uber and companies like it have can be seen to have ‘significantly reduced the barriers to reliable, independent income.’⁴⁸¹ It is undeniable that these platforms have created an alternative means for workers, who might otherwise struggle to gain access to traditional forms of work, to earn a living. The big question however is at what cost and how can it be addressed?

Chapter Seven of this study also examined the concept of ‘dependent self-employment’ as an intermediate category between employment and self-employment. It has been said that it is beyond the scope of this minor dissertation to address whether this category of worker is suited to the South African context. However it can be said that given that Uber drivers seem to occupy an awkward space in-between the binary upon which South African labour law rests, this is perhaps an option that is worth consideration by the legislature and / or the judiciary.

⁴⁸¹ Cheng op cit. n4 at 17.

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